



FEDERAL REQUIREMENTS AFFECTING NEW JERSEY SCHOOL NEGOTIATIONS

Although public sector labor relations is structured and controlled by state laws, there are a number of federal requirements that may impact collective bargaining agreements negotiated in New Jersey school districts. Boards of education must be aware of their obligation to comply with overtime compensation regulations established by the Fair Labor Standards Act, as well as the federal requirements concerning family leave. These regulations are discussed below.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was enacted in 1938 for the purpose of establishing fair labor standards for employment in and affecting interstate commerce. As a result of a 1985 U.S. Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 U.S. 1005 (1985), FLSA requirements were extended to state and local government employers, including school districts. Congress subsequently amended the Act making April 15, 1986 the effective date of applicability to state and local government employers and employees.

Key Provisions

The major provisions of the Fair Labor Standards Act are summarized below.

Compensation The Act requires that covered employees receive:

- regular compensation set, at least, at the federal minimum hourly wage;¹
- overtime compensation for hours worked in excess of 40 hours per week; overtime compensation is calculated as 1.5 times employees' regular hourly rate; and
- the substitution of compensatory time for overtime pay at the 1.5 rate and with a maximum of 240 compensatory hours (after the maximum is reached, payment must be provided at the overtime rate).

Covered Employees The provisions of the FLSA are applicable to all public employees who are not specifically exempted from the Act. Section 13 (a)(1) of the Act exempts all school employees who are "employed in the capacity of academic administrative personnel or teacher

in elementary or secondary schools." All other school employees, including secretaries, cafeteria workers, custodians and other support personnel, are covered by the minimum compensation requirements of the Act.

Calculation of Overtime Entitlement The FLSA requires payment of overtime compensation only when work hours exceed 40 hours per week. In defining a 40-hour work week, the FLSA does not count non-working time. Therefore, absences due to sick leave, personal days or holidays do not count in calculating a week's base working hours. In addition, meal periods where the employee is freed from duties and which last one-half hour or longer are not counted in the 40 hours of work required to obtain overtime. However, other "non-work" time, such as rest periods of 20 minutes or less, traveling between work sites as well as on-call time which restricts employees' movement, are considered compensable hours worked.

Further, under certain circumstances, employees who regularly work a second job for the same employer may be able to aggregate their total hours worked to become entitled to overtime compensation. Therefore, a custodian who works 30 hours for a school district and 20 hours as a security guard for the same district, may be considered to be working a 50-hour week and may be eligible for overtime compensation for 10 hours per week.

Calculation of the Overtime Rate The FLSA requires the payment of overtime at one and one-half times the employee's regular rate, which must be at least equal to the FLSA minimum wage. The overtime rate for employees who receive a fixed annual salary (as opposed to an hourly rate) is based on calculations that convert their salaries to a regular hourly rate. "Nondiscretionary" bonuses, defined as additional payments required by contractual agreements (such as longevity), must be included along with the salary to determine an employee's regular rate of pay and the overtime rate.

Impact on School Districts

The 1986 extension of the FLSA to local public employees has had little or no impact on New Jersey

¹ The latest applicable rates may be obtained by calling the Wage and Hour Division of the U.S. Department of Labor, 609-989-2247.

school district negotiations.² While the FLSA established a statutory minimum level of benefits that cannot be reduced by local negotiation, New Jersey school employees' contractual wage rates and overtime compensation already matched, or exceeded, those established by federal law. Since the FLSA permits negotiations of wage rates and overtime compensation that exceed its required minimums, existing negotiated agreements were generally unaffected by the Act's required levels of compensation. The FLSA did not invalidate local agreements to provide overtime compensation after 37 hours of work nor overtime rates that were based on twice the regular pay rate. Thus, boards continued to be obligated to honor all contractual arrangements that were more generous than the law. However, the FLSA's mandated requirement for overtime compensation for hours in excess of the defined 40-hour work week has affected districts' personnel practices.

The FLSA's requirement mandates careful maintenance of records and administrative oversight. For example, school districts must now be aware of any "informal additional hours" that employees may be at work in excess of their normal work week. Employees who log in these extra hours, without formal approval but knowledge of the administration, may be eligible for overtime compensation for any hours worked in excess of 40 hours per week. Further, if a school custodian is required to be in the building on weekends or is on a restrictive "on-call" status,³ any hours that exceed the 40-hour work week definition must be paid in accordance with the FLSA overtime calculation.

To avoid unanticipated FLSA overtime obligations, school management must consider the law's requirements before assigning staff to work outside the normal work week. Please consult with your attorney, the Labor Relations Department of the NJSBA or the U.S. Department of Labor to ascertain your obligations under the FLSA.

The Family and Medical Leave Act

Signed into law in August 1993, the federal Family and Medical Leave Act (FMLA) supplements New Jersey's Family Leave Act. Both laws entitle eligible school employees to unpaid leaves of absence, with continued health coverage and restoration to the same or equivalent position, for defined medical purposes. However, the federal law differs from the state law in a number of areas and, since covered boards of education must comply with the provisions of both laws, an understanding of the federal regulations is important to districts' negotiations and personnel administration.

Key Provisions of FMLA

The provisions of the FMLA apply to all school districts, but not all school districts' employees are covered by the law. Employees of a school board that has fewer than 50 employees in a 75 mile radius are not eligible for federal family and medical leave. Even though their employees are not eligible for federal leave, these districts are "covered" by the law and have an obligation to provide notice of the federal law's provisions.

The major provisions of the FMLA are as follows:

Available Leave Unpaid leave is available for a combined total of 12 work weeks during a 12 month period for the following purposes: the employee's own illness; the birth and first-year care of a child; the adoption or foster-parent placement of a child; and for the care of a child, spouse, or parent who has a serious health condition. (A serious health condition is defined as an illness or injury requiring inpatient care in a hospital or continuing treatment by a health-care provider. Note that pregnancy related disability is included in this definition.) Leave may be taken on a reduced or intermittent basis;

Eligibility for Leave To be eligible for leave, an employee must have been employed for at least a year and have worked for at least 1,250 hours during the previous 12 months; spouses employed by the same school district are eligible for a total of 12 weeks of leave each year for illness in the family but each have full entitlement to leave for their own personal illness;

Health Insurance Coverage Group health insurance must be maintained during the 12 week leave; if the employee fails to return to work after the expiration of the leave, the board may recover the cost of health premiums paid during the leave, unless the reason for not returning is the employee's health condition;

Interaction With Other Leaves The board may require the employee to substitute any accrued vacation leave, personal leave, or other leave for any part of the 12 week period;

Accrual of Benefits Taking leave under the FMLA does not result in the loss of any benefit accrued before the commencement of leave. However, employees cannot accrue seniority during their period of leave. Further, time on leave does not protect employees from lay-offs that would otherwise have occurred had the employee been actively employed. For purposes of pensions, time on leave does not constitute a break in service for vesting and eligibility purposes.

² It is also expected that the 1999 U.S. Supreme Court decision in *Alden v. Maine*, 5 WH Cases 2d. 609, U.S. Sup. Ct., No. 98-436, 6/23/99 will not have an impact on New Jersey school districts. That decision, which holds that state employees cannot sue the State in court for alleged noncompliance with the FLSA, appears to be limited to state employees and not to apply to municipalities and school districts.

³ Under the FLSA, on-call time may be subject to overtime/release time requirements depending upon how much the employee's movement is restricted as a result of being "on-call."

Reinstatement Rights Upon return from leave, employees must be restored to the same or equivalent position held when they commenced their leaves. Equivalent positions means positions that provide same seniority rights, status, employment benefits, pay and other terms and conditions of employment. For school employees, this also means that an employee cannot be reinstated to a position which requires additional licensing or certification.

Interaction With State Laws Boards that are also covered by a state Family Leave Act must comply with the appropriate provisions of both laws. However, the federal law specifically states that it does not supersede any provision of a state law that provides greater benefits. Therefore, boards must provide their eligible employees with the more extensive or generous benefits available under either the state or federal law.

Verification of Leave Requests The board may also require a doctor's certificate for leaves involving a serious health condition that affects either the employee or a family member.

Special Provisions for School Districts

Section 108 of the FMLA, and §825.600-604 of federal regulations, establish special rules for instructional staff employed by public or private elementary and secondary schools.⁴ The term instructional staff is intended to cover staff employed "principally in an instructional capacity" and applies to individuals whose presence is necessary to the educational process. This term covers: classroom teachers; athletic coaches; driving instructors, and special education assistants. It does not include: psychologists or counselors; teacher assistants; cafeteria or custodial workers; bus drivers and others who primarily perform noninstructional duties.

Special considerations are given based on instructional staff's work year and work responsibilities. However, most of the special provisions are designed to minimize the disruption to students when teachers' scheduled FMLA leave occurs through following specific circumstances:

Reduced or Intermittent Leave: To preserve educational continuity, the special rules address conditions that arise when an instructional employee plans to be on a reduced or intermittent leave for more than 20% of the working days over the period of leave (in other words, for more than one day in five). Under these circumstances, the board may require that the employee choose between taking leave in a block of time or to being temporarily transferred to another position for which the employee is qualified but that better accommodates the recurring need for leave without disrupting the students' educational program. The alternative position must provide equivalent pay and benefits.

Leaves Near the End of An Academic Term The FMLA and its regulations establish that, in certain leaves scheduled at the end of a semester, instructional staff may be required to take leave beyond the time they requested. In these situations, the period of extension does not count towards the employee's FMLA leave entitlement, but the district is still required to maintain group insurance coverage and to restore the employee to the same or equivalent job at the end of the leave.

In circumstances involving considerations of a district's academic calendar, the regulations specify that there can only be two terms or semesters in any given year. Extensions based on an academic calendar are authorized under the following conditions:

Return from Leave If a teacher begins a leave more than five weeks before the end of a semester, and the leave lasts for three weeks or more and the teacher wishes to return to work within the last three weeks of the semester, then the teacher could be required to extend the leave through the end of the semester.

Leaves Taken At the End of a Semester Similar extensions of FMLA qualifying leaves (other than personal illness) are authorized for leaves that begin at the end of a semester. For example, the district may require the teacher to extend leave through the end of the academic term when the leave begins less than five weeks before the end of the semester and lasts for more than two weeks, with a return date during the last two weeks of the semester. Similarly, an instructional employee who begins a leave of more than five work days within three weeks of the end of the semester may be required to take leave through the end of the term.

Leaves Extending To Another School Year FMLA regulations also address leaves where the leave entitlement begins at the end of the school year and continues in the next school year. For example, regulations permit an eligible school employee to schedule a qualifying FMLA leave for 6 weeks at the end of a school year and another 6 weeks at the beginning of the next school year. Since instructional employees are not normally required to work during the summer, the summer months could not count against these employees' statutory leave entitlement. Further, during the summer months, the district would be required to apply the same approach to maintaining group health insurance coverage that it provides all employees who are not expected to work during that vacation period but who are expected to return to employment at the end of the recess.

Implications for Local Boards

It is clear that the FMLA holds a number of significant implications for New Jersey's local boards. In addition, to the general expectation that employers will comply

⁴ Note, these special conditions do not apply to colleges, universities, trade schools or pre-schools.

with the law and respect employees' rights, the FMLA imposes specific administrative responsibilities on boards of education.

Compliance with FMLA In addition to respecting employees' rights under the family leave laws, boards are expected to comply with all relevant provisions. First and foremost, this means that districts' management team must be well-informed of employees' leave entitlements and must be provided resources to administer these statutory benefits. While employers' administrative responsibilities are defined in the federal code, many aspects related to meeting these obligations will require additional clarification and coordination. It is therefore imperative that boards consult with their legal and labor resources as they develop the procedures required by the law and when they face requests for leaves that qualify for FMLA benefits.

Providing Notice to Employees The FMLA requires all boards, regardless of whether the number of their employees qualifies them for the law's coverage, to inform their staff of the benefits and obligations of the federal law. Boards with at least 50 employees must also include an explanation of FMLA entitlements in employee handbooks or written employment policies. In addition, boards must also provide employees with information concerning the procedures for filing complaints of alleged violations of the Act.⁵

Boards must also provide employees who request leave that is covered by the Act with specific information on the federal benefit. The FMLA expects that employees will largely be unaware of their rights and obligations and thus requires employers to inform each employee of the provisions of the act. Further, employees are not required to designate whether they are requesting statutory leave; rather, the employer is expected to notify the employee that the requested leave qualifies as FMLA leave. Therefore, it would appear that boards would be well-advised to inform their employees when any requested leave will also count against time provided in the federal law. Boards also have the responsibility of informing employees whether their requested leave also qualifies under New Jersey's Family Leave Act. (See discussion on *Coordinating State and Federal Benefits*, later in this article.)

Maintaining Records Boards also have the responsibility to maintain appropriate records. These records are intended to ensure employees' eligibility for statutory leaves, document notice to the employee, and to keep track of the amount of leave taken that qualifies for the Federal and/or State law.

Defining the Qualifying 12 month Period The FMLA's entitles employees who have been employed for

the required number of hours to have 12 weeks leave in any 12 month period. However, the federal regulation also permit a board to choose any one of the following four methods to define the 12 month period as long as that method is applied consistently and uniformly: 1) a straight calendar year; 2) 12 months beginning with a fixed point in time, such from September 1 to August 30; 3) a "rolling period" which begins as of 12 months immediately prior to the requested leave; or 3) 12 months immediately following the request. Boards must, however, assure that employees are informed of the district's definition of the 12 month qualifying period and that its definition is applied uniformly and consistently.

A board's chosen definition can affect the employee's entitlement and the length of the employee's absence. For example, if the year is defined as a straight calendar year or a fixed point in time, employees may "stack" their leaves to take the last 12 weeks of a defined year and the first 12 weeks of the next year, thus creating an entitlement to a 24 week leave. However, a year defined in terms of the 12 months immediately preceding the requested leave precludes the possibility of "stacked" FMLA leave. It would thus appear that boards would be well-served to adopt the definition of the 12 month period that precludes eligible employees from "stacking" their entitlement to family leave.

Coordinating State and Federal Benefits While many provisions of the state and federal statutes are identical, there are significant differences that can affect the administration of family leave. These major differences, summarized in the chart following this article, include the purpose of the leave (with the federal law including personal illness), the federal provision that other leaves may be included in the amount of FMLA leave, and the amount of leave entitlement. Recognizing that federal provisions could create discrepancies with state laws, the FLMA specifically states that, in these circumstances, employees would be entitled to the most generous benefit.

Local districts will thus need to understand which areas of the two laws are considered "most generous" and applicable to eligible employees. This is very clear in some areas, but is still murky in many others. For example, the federal law provides the ability to adjust leaves occurring at the end of an academic year to reduce disruption in the educational program; New Jersey's law is silent on that issue. Does the silence of the state law create a "more generous" employee benefit? This, and many other, questions are likely to be answered through future clarification and litigation. Again, boards should rely on the expertise of their legal counsel when dealing with issues involving FMLA and FLA leaves.

⁵ Sample forms to provide such notice are included in appendixes to the Federal Code and can also be obtained from local offices of the Department of Labor's Wage and Hour Division.

Negotiations Obligation Although the FMLA recognizes that leaves are frequently the topic of negotiations, it does very little to reconcile its legal requirements with boards' negotiations obligations.⁶ Therefore, understanding boards' rights and obligations in New Jersey's collective bargaining environment will depend upon clarifying case-law emerging from litigation. In 2002, an Appellate Division decision determined that the FMLA did not completely preempt negotiations, but permitted and encouraged boards to negotiate benefits that exceeded that provided by statute. In *Lumberton Board of Education*⁷ the court found that the issue of counting FMLA leave time concurrently with contractual leave time, rather than adding FMLA leave to contractual time, was a mandatorily negotiable subject. Accordingly, the court and that boards could not refuse to negotiate over the issue of "stacking" contractual and federal leaves.

The process of defining the extent of boards' obligations to negotiate issues involving the administration of FMLA qualifying leaves remains an area of future

developments. Once again, boards should consult with their legal and labor resources to assure awareness of latest developments in this area.

Summary

Federal statutes and regulations, such as the FLSA and the FMLA, require local boards to provide federally established minimum levels of benefits to their eligible employees. These federal statutes can affect local negotiations as well as the local administration of employee rights and benefits. Districts' management teams must therefore be aware of their obligation to provide overtime compensation and family leave to their eligible employees and must consult with their legal and labor resources to assure their full compliance with these federal requirements.

⁶ For an example of how boards can approach negotiations of leaves covered by the FMLA, please see the article "Maternity Leaves: Disability and Child Care" in the Selected Contract Clauses section of NJSBA's publication *The Negotiations Advisor*.

⁷ *Lumberton Board of Education v. Lumberton Board of Education*, App. Div. Dkt. No. A-1328-01T5, decided October 8, 2002.

FAMILY LEAVE ACT

SIGNIFICANT DIFFERENCES BETWEEN STATE

New Jersey *Family Leave Act*

Permitted purposes for leave:

- serious health condition of spouse, child, parent (includes parent-in-law);
- birth or placement for adoption of child (placement of foster child is not specifically included).

Leave entitlement is 12 weeks in any 24-month period.

Entitlement to leave for birth or placement of a child *must begin* within one year of birth or placement.

Employer must grant leave to eligible employees from the same family who wish to take leave at the same time.

Eligible employees must be employed for at least 12 months, and for not less than 1,000 base hours during the immediately preceding 12-month period.

Existing district policy governs the use of accrued paid leave. If there is no policy regarding the use of accrued paid leave, the employee may opt to use it but the employer may not require its use.

Employees must provide 30 days' notice of birth or adoption, and 15 days' notice of serious health condition (emergencies excepted). Written notice may be required by policy.

During leave, the employer must maintain group health insurance at same level, as well as any other benefits that the employer usually maintains for its employees on temporary leave.

Permits employer to require employee's signed certification attesting to reasons for leave. Leave

Federal *FMLA*

Permitted purposes for leave:

- serious health condition of spouse, child, parent (excludes parent-in-law);
- employee's own serious health condition;
- birth or placement for adoption or foster care of child.

Leave entitlement is 12 weeks in any 12-month period.

Entitlement to leave for birth or placement of a child *expires* one year after birth or placement.

Spouses are only entitled to a combined total of 12 weeks for the birth or placement of a child. Each spouse may make up the rest of his/her 12-week entitlement with leave for a purpose other than birth or placement.

Eligible employees must be employed for at least 12 months, and for at least 1250 hours during the previous 12-month period.

The employer may require or the employee may elect to substitute any accrued paid leave for leave under the FMLA. (But the FMLA will not affect N.J. law which only permits the use of paid sick days for the school employee's own illness.)

Employees must provide 30 days' notice of all foreseeable need. (Where not foreseeable, notice is to be given within two business days.) Leave may not be denied for failure to provide *written* notice.

During leave, group health insurance must be maintained. Law contains no obligation to maintain other benefits such as life insurance, disability insurance, etc., although these must resume upon employee's return.

The law contains no provision for requiring an employ-

FAMILY LEAVE ACT

SIGNIFICANT DIFFERENCES BETWEEN STATE

New Jersey *Family Leave Act*

Limits the amount of leave that may be taken on a reduced or intermittent basis. Employers are not required to permit leave in blocks of less than one workday.

The law is silent regarding the transfer of an employee on reduced or intermittent leave to an alternative position.

The law contains no provision for permitting a district to extend the return of instructional employees to the end of the academic year. Rather, the law states that an employer may *not* require an employee to take leave beyond the period of time requested.

Law does not address recoupment of health premiums should the employee fail to return to work after leave.

Contains some restrictions on outside employment during leave.

Certain high paid employees (top 5%) may be denied leave to prevent substantial and grievous economic injury to operations.

Federal *FMLA*

No limits on the amount of leave that may be taken on a reduced or intermittent basis. Permits intermittent leave to be taken in units as small as employer's payroll system uses to account for use of leave.

Provides that during intermittent or reduced leave, an employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified, has equivalent pay and benefits, and which better accommodates recurring periods of leave than the regular position.

Under certain circumstances, districts may require *instructional* employees on intermittent or reduced leave to choose between taking an interrupted block of time, or transferring to an alternative position (as described above).

A district may require that an employee wait until the next semester to return after a leave if, subject to certain conditions, the return is requested to take place within the last three weeks of the semester.

If the employee fails to return to work after leave expires, the employer may recover the cost of health premiums paid unless the reason for not returning is due to the continuation of the serious health condition or another reason beyond the employee's control.

Silent regarding outside employment during leave.

High paid employees may not be denied leave, but certain high paid employees (top 10%) may be denied restoration to employment if necessary to prevent substantial and grievous economic injury.

Contains specific record-keeping requirements.

Both state and federal laws permit the employer to require a certification from a *health care provider*; there are subtle differences in what is permitted under state and federal regulations. Federal regulations contain a checklist for the health care provider's use.

Under both state and federal law, employees may only take intermittent leave or leave on a reduced basis *with the employer's agreement*. Leave may be taken for family illness without employer's agreement; employees must make reasonable efforts not to unduly disrupt employer's operations.

