MANAGING LEAVES AND RELATED BENEFIT ISSUES

Employers Association of NJ
HR Law Certificate Program

Session Three

Laws which must be considered when an employee requests a leave of absence.

Job Protection
Federal Family and Medical Leave Act - FMLA
New Jersey Family Leave Act - FLA
Americans With Disabilities Act - ADA
NJ Law Against Discrimination - NJLAD

Monetary Benefit
New Jersey State Plan Disability Benefits - TDB
Workers Compensation - WC
New Jersey Family Leave Insurance - FLI

FMLA
Federal Family and Medical Leave Act

• Provides 12 weeks of unpaid leave to an eligible employee for qualifying reason (26 weeks to care for a covered servicemember) in a 12-month period

• Continuation of group health benefits

• Right to reinstatement in most cases
**EMPLOYER COVERAGE**

Employ 50 employees for 20 weeks in current or preceding calendar year

**EMPLOYEE ELIGIBILITY**

(must meet all three requirements)

1) 12 months of service (need not be a consecutive)
   include service prior to break of <7 years, military duty, joint employment

2) worked 1250 hours in the 12-month period immediately before the leave

3) works within 75 miles of 49 other employees
   Not their home – where report or get assignments

If employee initially on non-FMLA leave, and becomes eligible for FMLA leave, employee is entitled to full amount of FMLA leave in addition to leave already taken

**AMOUNT / FORMS OF LEAVE**

12 weeks* in a 12-month period

*26 weeks to care for ill/injured servicemember

Consecutive – uninterrupted leave

Intermittent – separate block of time for the same reason

Reduced -- reduction in number of hours worked

Employee must consult w/employer and make reasonable effort to schedule so as not to disrupt employer's operations.

Shortest increment of time for intermittent or reduced leave is one hour (or less if a shorter period of time is used to account for other types of leave)

FMLA must be allowed to be taken in increments no greater than the shortest period of time used to account for other forms of leave, but never more than one hour

As examples:

1. A company allows sick pay to be used in 30 minute increments. FMLA must be allowed in 30 minute increments.

2. A company only allows PTO days be used in whole day increments. FMLA must be allowed in one-hour increments.

3. A company allows vacation time to be used in half-day increments. FMLA must be allowed in one-hour increments.
1. Birth of child or placement for adoption or foster care
   Fathers, too
   Need only be offered consecutively
   Leave must be completed by child’s first birthday
2. Care for family member with serious health condition
   Spouse, parent, child
   (<18 or incapable of self-care)
   Physical and/or psychological care
3. Employee’s own serious health condition
4. “Qualifying exigency” resulting from family members
   active duty or call to active duty in the military
   “Exigency”
   situation arising out of the fact that a family member is
   on active duty, or has been notified of an impending call
   to active duty in the regular or reserve component
   Armed Forces in a foreign county
   “family member”
   Spouse, parent, or son/daughter (child of any age) in
   covered active duty
1. Short-notice deployment (notification received by military member 7 days prior to the actual deployment).
2. Military events and related activities.
3. Childcare and school activities.
4. Financial and legal arrangements
5. Counseling
6. Rest and recuperation – 5 (15) days
7. Post-deployment activities
8. Additional activities

**REASONS FOR LEAVE, cont.**

5. Care for a family member injured in active military duty

Current member of the Armed Forces - includes guard and reserves – (or a veteran) who receives treatment w/in 5 years of service.

- undergoing medical treatment, recuperation, therapy, is in outpatient status or on temporary disability retired list for a serious injury or illness which occurred in the line of duty
- Employee is spouse, son / daughter, parent, next-of-kin

Caring for a covered servicemember entitles an employee to:

- **26 weeks FMLA leave**

which can be taken in one 12-month period, which begins when the leave commences.

The leave is applied on a “per-servicemember, per-injury” basis, which means that, in a different year, an employee may be entitled to take another period of 26 weeks of leave if needed for a different servicemember or to care for the same servicemember with a different injury.

- **26 weeks includes any FMLA taken for other purposes (not an additional 26 weeks)**
EMPLOYEE NOTICE

For foreseeable leaves: 30 days advanced notice from employee, or, as soon as possible. The employee must, when requested by the employer, explain why it was not practicable to supply timely notice.

For other leaves: as soon as practicable under the facts and circumstances of the particular case...usually the same or next business day, or within the employer’s usual and reasonable call-in procedure.

When initially requesting a leave, employee does not have to mention statute, but should give sufficient notice to make employer aware of the need for a leave and the anticipated duration.

The employee should state whether there is a condition that makes the employee unable to perform the duties of his job; if a family member is in the hospital or under the continuing care of a doctor; if a family member had a military exigency; etc.

“I’m sick” is NOT acceptable.

The employee has the obligation to respond to any employer questions designed to determine whether the time is FMLA qualifying. An employee’s failure to cooperate could result in the leave being denied.

For notice of subsequent requests for a leave already granted, like intermittent leaves, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA.

EMPLOYER NOTICE REQUIREMENTS

- General Notice - POSTER
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice
**Employers Association of New Jersey**

**HR Law Certification Program**

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**ELIGIBILITY / RIGHTS AND RESPONSIBILITIES NOTICE**

To inform an employee of their eligibility to take FMLA. If the employee is not eligible, the notice must state at least one reason for ineligibility.

States the employee obligations during the leave and the consequences of failing to meet those obligations.

Must give notice to the employee within *5 business days* of the request for a leave.

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**PART B: RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE**

To determine whether the leave is FMLA qualifying, include the following:

- Provide notice to the employee within 5 business days of the request for a leave.
- If the leave is being taken for a FMLA qualifying reason (e.g., after receiving medical certification).

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**DESIGNATION NOTICE**

To notify employee if leave is FMLA qualifying or not, as well as any requirement for use of vacation or other paid leave as part of the unpaid FMLA leave; whether a fitness for duty certification is required; the amount of leave counted against the employee's FMLA entitlement.

Provide to employee within *5 business days* from when employer has enough information to determine if leave is being taken for an FMLA qualifying reason (e.g., after receiving medical certification).
Employer must request certification in writing

within 5 business days from when the leave is requested.

(usually provided with the "Rights and Responsibilities Notice")
The employee has 15 days to submit the required certification unless it is not “practicable” to do so within that time despite the employee's “diligent, good faith efforts”

Failure to provide a complete and sufficient certification, or any certification, may result in denial of FMLA leave.

If the certification is complete, no further information required

If clarification or authenticity are needed, after giving the employee the opportunity to cure any deficiencies (7 days), the employer may communicate with the employee's health-care provider:

- human resource professional,
- leave administrator,
- health care provider or
- management official.

Under no circumstances may the employee’s direct supervisor contact the health care provider.

If doubt validity of certification, employer can require a second opinion...if that differs from the employees doctor, a binding third opinion can be obtained.
One provision of GINA prohibits employers from acquiring genetic information about employees. However, one of the limited exceptions is if the receipt of the information is inadvertent. When making a lawful request for medical information, receipt of genetic information will be considered inadvertent if the employer directs the employee and/or doctor not to provide genetic information. The following Safe Harbor Notice should be used:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.
**RECERTIFICATIONS**

Every 30 days unless
If a previous certification specified a minimum period of incapacity of more than 30 days, when that minimum period has passed, or 6 months, whichever is less.

In all cases, recertification may be requested earlier if:
- a. Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications), or
- b. The employer has received information that casts doubt upon the continuing validity of the certification, or
- c. The employee has requested an extension of leave.

**FITNESS FOR DUTY**

If the employer provided the health care provider with a listing of the employee's essential job duties (with the designation notice), the employer may require that the medical certification address the employee's ability to perform the essential functions of his job.

Fitness for duty certification may not be requested upon return from each instance of an intermittent leave. However, if "reasonable safety concerns" exist regarding the employee's ability to perform his job, one may be requested every 30 days. Reasonable safety concerns is a fairly high standard, meaning a reasonable belief of significant risk of harm to the individual or others.

**CONTINUATION OF INSURANCE**

Continue Group Health insurance during leave:
- Employee must still pay their portion
  - 30 day grace period with 15 day notice

Non-health insurance (life, disability) treat same as for employees on other types of leave

No requirement to continue pay
Generally, FMLA leave is unpaid. However, an employee can elect, or an employer may require that accrued paid time off (such as vacation, sick pay, PTO) be used during an unpaid FMLA leave.

The employee must follow the terms of the company’s paid time off policy (if vacation is only allowed to be used in full day increments, then the employee on FMLA for 4 hours could not use ½ vacation day).

The time the employee is absent and using such pay will count against their FMLA entitlement.

**SUBSTITUTION OF ACCRUED PAID LEAVE**

12 weeks FMLA

| 2 weeks paid vac | 10 weeks unpaid leave |

Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave.

Because leave pursuant to a disability leave plan is not unpaid, the provision for substitution of paid leave is inapplicable (§23.207(d))

Because the workers’ compensation absence is not unpaid, the provision for substitution of the employee’s accrued paid leave is not applicable. (§23.207(e))

However, the employer and employee may agree to have paid leave supplement the disability or worker’s compensation benefits.

$ TDB or WORKERS COMP $
**REINSTALLMENT**

The employee must be returned to the same or equivalent job virtually identical in the terms of pay, benefits, working conditions, status perquisites and privileges. Same or substantially similar duties, responsibilities, skills, effort and authority.

- Reinstatement not required if employee would have been laid-off
- Reinstatement can be denied to certain "key" employees 10% highest salaried employee and reinstatement would cause substantial and grievous economic harm to the operations.

**NEW JERSEY FAMILY LEAVE ACT**

Provides 12 weeks of unpaid job-protected leave in a 24 month period for the purpose of caring for an ill family member or a newborn.

**EMPLOYER COVERAGE**

Employ 50 or more employees for 20 weeks in current or preceding calendar year.

**EMPLOYEE ELIGIBILITY**

Work with current NJ employer for at least 12 months need not be consecutive

Work 1,000 base hours in year before leave

Hours worked including overtime, receipt of worker’s compensation, and hours the employee would have worked but for military service.
REASONS FOR A LEAVE

Birth of a child or placement for adoption
Care for ill family member
  parent,
  parent-in-law,
  child,
  spouse,
  civil union partner

AMOUNT / FORMS OF LEAVE

12 weeks in a 24-month period
  calendar year, any “fixed” leave year, measured forward from first leave taken, rolling 24-month period measured backward
Consecutive – up to 12 weeks for same reason
Intermittent- increments of one or more full weeks
Reduced – increments less than a week but at least full day

EMPLOYEE NOTICE

30 days notice unless emergent circumstances warrant shorter notice
  Company can request the notice be in writing and supported by certification of health care provider
    date SHC commenced, probable duration, medical facts
    2nd and 3rd opinions allowed
EMPLOYER NOTICE

Poster
Notification of method chosen to calculate the 24-month period
Written guidance to employees regarding their rights and obligations under the Act
Fact Sheet

BENEFITS DURING LEAVE

• The leave is unpaid
• Use of accrued paid leave, treat the same as for other similar type leaves
• No insurance continuation (Continuation of group health plan preempted by ERISA)

REINSTATMENT RIGHTS

Restore to same job. If that job is filled, restore to equivalent position

A leave may be denied to a “key employee”
Base salary within highest 5% or is one of 7 highest paid employees (whichever greatest)
Must show leave would cause substantial and grievous economic injury to employers operations
Must notify employee of intent to deny leave
CORRELATION WITH FMLA

When an employee requests a leave for a reason covered under only one law, the leave only counts against his entitlement under that law and only the provisions of that law apply.

When an employee requests a leave for a reason covered by both the State and Federal leave laws, the leave counts against the employee’s entitlement under both laws...they run at the same time. The employee will be entitled to the benefits of whichever of the two laws is more favorable to him.

THE MATERNITY SITUATION
### FMLA

**Federal Family and Medical Leave Act**

### NJ FLA

**State Family Leave Act**

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*Federal Leave entitlement of 12 weeks is exhausted August 28, so remainder of leave for newborn is under NJ Family Leave Act only*

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**BIRTH**

- **7/3**

**“special” baby chart**

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### In some circumstances, the NJ FLA may begin even when the employee is still disabled. For this to occur, three conditions must be met: 1) the FMLA must be exhausted 2) the baby must be born 3) the employee must request State leave.

### What if an employee is not eligible for a FMLA leave

- **What if an employee needs more time off**

  …..other “protections” may apply

  - Company policy
  - Past practice
  - Contract
  - ADA/NJLAD
TITLE I - ADA

“No [employer] shall discriminate against a qualified person with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

NJ Law Against Discrimination (LAD)

“Disability” means:

• Suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness, or
• From any mental, psychological or developmental disability resulting from anatomical, psychological, physiological, or neurological conditions, that either
  1. Prevents the normal exercise of any bodily or mental functions, or
  2. Is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques

When a person is unable to perform their job because of a disability, the ADA and NJLAD require that we accommodate them.

Permitting the use of accrued paid leave or unpaid leave is a form of reasonable accommodation
• Obtaining treatment
• Recuperation
Interactive Process

Like any other request for an accommodation, the employer and employee must engage in a dialogue regarding the request for a leave to determine what works.

Employee can not be automatically fired under “No Fault” leave policy unless:

- There is another effective accommodation that the employee refuses, or
- Granting additional leave is an undue hardship.
  *Unduly disruptive, too expensive, fundamentally alters the job.

Show me the money!

NJ WORKERS COMPENSATION LAW
To provide a financial benefits for an occupational disability (arising out of and in the course of employment)

- Payment of medical expenses
- Temporary disability benefits
  - Weekly benefit rate
    - 70% AWW max $810 (2012)
    - Up to 400 weeks
    - 7 day waiting period
- Permanent partial/total disability benefits
- Death benefits
**NJ TEMPORARY DISABILITY BENEFITS LAW**

To provide a financial benefit to individuals who are unable to perform the duties of their job because of a non-occupational disability

Weekly benefit rate

\[
\frac{2}{3} \text{ AWW} \quad \text{max $572} \quad (2012)
\]

Payable for up to 26 weeks

Disability commencing while employed or within 2 weeks

7 day waiting period

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**NJ FAMILY LEAVE INSURANCE**

To provide a financial benefit to individuals who are unable to work because they need to care for newborn or ill family member

Weekly benefit rate

\[
\frac{2}{3} \text{ AWW} \quad \text{max $572} \quad (2012)
\]

Payable for up to 6 weeks

Need for absence commenced while employed or within 2 weeks

7 day waiting period

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**BIRTH**

7/3

**FMLA**

Federal Family and Medical Leave Act

**NJ FLA**

State Family Leave Act

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Period of Actual Disability (TDI)

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MANAGING THE ABSENCE

No job protection under TDB / WC / FLI, but money is nice

Company policy
    Notice procedures
    Timing/format
    Job restoration
    Benefit continuation
    Use of PTO