

## **N.J. HUMAN RESOURCES LAW ALERT**<sup>TM</sup>

A publication of Saiber LLC's Employment Law Group  
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### **GET READY FOR NEW JERSEY'S NEW FAMILY LEAVE INSURANCE LAW**

We begin the New Year by focusing on New Jersey's new "Family Leave Insurance Law" ("FLI"), sometimes referred to as the "Paid Family Leave Law", and how it will affect your employees in New Jersey. Although employees are not eligible for benefits until July 1, 2009, you need to be aware of these changes now so you may make appropriate changes to your policies and procedures.

It is important to understand that the new law does not actually provide for "leave"; it provides for payments for eligible employees who are absent from work for certain enumerated circumstances. The new law does not guarantee that an employee who is absent from work, and eligible for payments under the FLI, will be reinstated at the end of the absence to his/her same position or a substantially equivalent position, although the employee may be entitled to such protection under the federal Family and Medical Leave Act ("FMLA") or the New Jersey Family Leave Act ("NJFLA").

The new law amends the New Jersey Temporary Disability Benefits Law ("NJTDBL") by providing eligible employees with up to six weeks of disability payments for absences from work to care for a newborn child, a newly adopted child, or for a family member with a serious health condition. While it would appear that the instances in which an employee is eligible for such payments mirror the types of leave covered under the NJFLA, there are differences.

#### **WHO IS COVERED BY THE NEW LAW?**

**Employers:** Unlike the NJFLA, which applies only to employers with 50 or more employees, the FLI applies to any New Jersey employer whose employees are eligible for benefits under NJTDBL, regardless of the number of employees. Under the NJTDBL, a "covered employer" is any employer who employs one or more individuals and pays the individual(s) at least \$1,000 in the current or preceding calendar year. So almost all

private businesses are "covered employers" under the NJTDBL and, therefore, the FLI.

**Employees:** To qualify under the FLI, an employee must currently be working or have been out of employment for less than two weeks. The individual must have worked at least half-time for at least 20 calendar weeks in covered New Jersey employment in which he or she earned no less than the minimum hourly wage (i.e., currently \$143 per week), or have earned at least \$7,200 for the "base year" period.

#### **ABSENCES QUALIFYING FOR PAYMENT UNDER FLI**

Under the FLI, an eligible employee may receive up to six weeks of paid benefits from the State (or the employer's private fund if it has been approved by the State) during any 12-month period. In order to receive the payments, the employee must submit a claim to the Division of Temporary Disability Insurance within 30 days of the start of the absence from work for a qualifying reason. In addition, an employee must give the employer 30 days advance notice of his or her intent to take leave, unless unforeseen circumstances prevent such notice.

Benefit payments under the FLI will be made:

- to provide care, as defined by the NJFLA, for a family member who has a serious health condition;
- to be with a child during the first 12 months after the child's birth if either the individual, or the domestic partner or civil union partner of the individual, is a biological parent of the child; or
- during the first 12 months after the placement of the child with the employee for adoption.

There are slight differences in the definitions used in the FLI and the NJFLA. For example, while the NJFLA's definition of a "parent" allows the employee to qualify for leave while caring for a parent-in-law, the FLI does not extend benefits for care of in-laws.

Similarly, while the NJFLA extends leave to an employee caring for a “child” of any age, the FLI limits benefits to an employee caring for a child under the age of 19. Thus, there are instances where an employee may be eligible for unpaid leave under the NJFLA to care for a parent-in-law or an older child with a serious health condition, yet may not be eligible to receive payments under the FLI.

A central question for employers will be how to apply the leave provisions of the NJFLA, or FMLA, in conjunction with the benefits provisions of the FLI. As explained above, the FLI provides only benefits, and does not provide leave. Employees who qualify under the NJFLA or FMLA are additionally entitled to the leave and job protections offered by those laws. The FLI will merely act to convert a portion of that leave, which otherwise would be unpaid, into paid leave.

#### **AMOUNT EMPLOYEE IS ENTITLED TO RECEIVE**

The weekly benefit an employee is eligible to receive under FLI is the same as that for which he or she is eligible under NJTDBL – i.e., two-thirds of his or her weekly compensation (capped at \$524 per week) for up to six weeks, during any 12-month period. If the employee takes intermittent leave, the employee will be eligible to receive up to \$74.85 per day, for up to 42 days, during any 12-month period.

The employer may permit or require the employee to use up to two weeks of employer-provided paid sick leave, vacation time, or other leave at full pay before the employee can start to draw benefits under the FLI. In such a situation, the number of days for which an employee may receive FLI benefits will be reduced by the number of days of employer-provided paid leave benefits.

Under the NJTDBL, no benefits are paid for the first seven (7) days of a period of disability, unless and until the disability lasts for three consecutive weeks. This seven-day “waiting period” also applies to benefits under the FLI. However, if the employer requires the employee to use paid leave, the employee will be entitled to receive the employer-provided pay during the waiting period.

#### **WHEN BENEFITS BEGIN, AND COST TO EMPLOYEES**

The FLI is to be funded entirely through employee payroll deductions, with no contributions from employers. As of January 1, 2009, employees must pay an additional tax of 0.09% on the portion of wages, approximately \$27,700, subject to NJTDBL withholding, amounting to up to \$24.93 per year or \$0.48 per week. However, in 2010, the tax rate will be increased to 0.12% of wages. Assuming the portion of wages subject to NJTDBL remains at \$27,700,

employees will be taxed up to \$33.24 per year, about \$0.64 per week. This may be achieved through payroll deduction.

Although employees began paying the tax on January 1, 2009, they will not be eligible to claim FLI benefits until July 1, 2009. This delay is meant to provide the State time to raise the necessary revenues to fund the benefit.

As with NJTDBL, employers have the option of using the State-operated plan or a private plan through self-insurance or an insurance policy. The private plan must provide the same (or better) benefits under the same eligibility requirements and costs to the employee as the State-operated plan.

#### **EMPLOYER’S DUTY TO NOTIFY EMPLOYEES**

The New Jersey Commissioner of Labor is making available a form notice of benefit rights. Employers are required to post and distribute the notice to their employees. In addition, employers are required to provide the written notice to: (1) any employees hired after the notice is initially distributed, (2) any employee who tells the employer that he/she plans to take time off for a reason covered by the law, and (3) any employee who requests a copy of the notice. Whenever an employee uses paid family leave, by the ninth day of the leave, the employer must send a notice to the Division of Temporary Disability Insurance and to the employee containing certain personal and compensation information regarding the employee. (The Division will create a form for employers to use for this purpose.)

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#### **Saiber LLC’s Employment Law Practice Group**

Saiber represents management in all varieties of employment law matters, including discrimination claims, unfair competition cases and compensation disputes, before state and federal courts, administrative agencies and arbitration panels. The firm’s Employment Law Practice Group, consisting of six partners and seven associates, counsels and defends companies large and small, national and multinational, private and public.

**Sean R. Kelly, Esq.**, a Partner in the firm’s Employment Law Practice Group, has over 29 years experience in advising and defending employers. A graduate of Yale College and Georgetown Law, Mr. Kelly is a former Master of the Sidney Reitman Employment Law Inn of Court, is Certified by the New Jersey Supreme Court as a Civil Trial Attorney, and frequently publishes and lectures on employment law before business and legal professional groups.

For more information on any of the items appearing in the Alert™ you may contact Mr. Kelly at the phone number or e-mail address listed below.

Also, if you know of others in the New Jersey Human Resources community who we should add to our mailing list, please send their mailing addresses to [skelly@saiber.com](mailto:skelly@saiber.com).

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