

## **New Jersey to Provide Payments to Workers Taking Leave to Care for Dependent Family Members**

**April 17, 2008**

On April 7, after several years of intensive lobbying and legislative negotiations, the New Jersey Senate passed an Assembly bill that, once signed by the governor, will make New Jersey the third state to provide state payments for workers on leave to care for dependent family members. Governor Corzine has announced that he intends to sign the bill. The bill amends New Jersey's Temporary Disability Benefits Law (TDBL) such that, commencing July 1, 2009, employees taking "family temporary disability leave" shall be eligible to apply to the state for up to six weeks of disability benefit payments. Although the amendment does not grant any new entitlement to take family leave, the amendment now grants employees up to six weeks of payments during a qualifying leave—which inevitably will encourage more employees to take leave. The amendment also imposes additional administrative requirements of which all New Jersey employers should be aware—even those employers otherwise exempt from other federal or state laws governing family leave.

### **The Mechanics of New Jersey Family Temporary Disability Benefits**

Under the amended TDBL, covered employees are eligible to receive benefit payments for up to six weeks of continuous family temporary disability leave (or up to 42 days of such leave taken on an intermittent basis) during any 12-month period. The TDBL defines "12-month period" as beginning on the first day of the employee's first period of family temporary disability leave. Weekly benefit payments shall equal two-thirds of the employee's average weekly wage from the preceding eight weeks, up to a maximum of \$524.

The first week of family temporary disability leave is considered an unpaid "waiting period." Benefit payments commence with the second week of leave. Benefits for the waiting period may be paid retroactively, but only if the leave period extends beyond three weeks. There is no waiting period if the employee commences family temporary disability leave immediately after a disability period based on the employee's own disability.

The TDBL defines "family temporary disability leave" as leave taken to (1) provide care for a family member's "serious health condition," as defined in New Jersey's Family Leave Act (FLA), or (2) "be with a child" during the first 12 months after the child's birth or placement for adoption. Family temporary disability leave is not available for medical leave based on the employee's own disability, although existing temporary disability benefits may be available to an employee while on leave for his or her own health condition.

Employees must notify the employer of the need for family medical leave in a “reasonable and practicable manner,” with at least 15 days’ advance notice before commencing leave taken on an intermittent basis, “unless an emergency or other unforeseen circumstance precludes prior notice.” Employees also must “make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer,” including, “if possible,” a regular weekly schedule for the taking of intermittent leave. In contrast with the unpaid intermittent leave scheduling provisions of the FLA and the federal Family and Medical Leave Act of 1993 (FMLA), benefit payments for paid intermittent leave under the TDBL are paid only for leave taken in increments of not less than one day.

In the case of family medical leave (not childcare leave), the employee must, upon the employer’s request, provide certification by a healthcare provider. In accordance with the requirements of the FLA and its implementing regulations, such certification should set forth the date of onset and probable duration of the condition; the “medical facts within the knowledge of the provider” regarding the condition; a statement that the condition warrants the employer’s participation in providing healthcare, and the estimated time thereof; and the need, if any, for such leave to be taken intermittently, including the dates of any planned medical treatment.

Employees must provide at least 30 days’ notice to the employer of leave to be taken to care for a child. Failure to do so will reduce the amount of benefits available by two weeks, unless the time of the leave is unforeseeable or changes for unforeseeable reasons.

Benefits provided under the TDBL are paid concurrently with any period of family leave taken under the FLA or the FMLA. Employees may not receive family temporary disability benefits simultaneously with unemployment benefits or other state-provided disability benefits.

### **Interplay with Other Federal and State Family Leave Requirements**

By itself, the TDBL does not *entitle* New Jersey employees to take any period of family temporary disability leave. The TDBL explains:

Nothing in [the revised law] shall be construed to grant an employee any entitlement to be restored by the employer to employment held by the employee prior to taking family temporary disability leave or any right to take action against an employer who refuses to restore the employee to employment after the leave.

Rather, the TDBL incorporates the leave requirements of the FLA and the FMLA, stating specifically that it does not “increase, reduce or otherwise modify any entitlement of an employee to return to employment or right of the employee to take action under the provisions of” those statutes.

Although the TDBL does not expand employees’ *entitlement* to family leave, it does expand employees’ eligibility for *temporary disability benefits* while taking leave under the FLA or the FMLA. The TDBL covers all New Jersey employers that are subject to the New Jersey Unemployment Compensation Law, including employers that are exempt from the FLA or the FMLA (e.g., businesses that employ fewer than 50 employees). Furthermore, unlike the FLA or the FMLA, the TDBL does not require employees to have worked a minimum number of hours in the preceding 12 months to become eligible to receive benefits; rather, employees need only to have worked for at least 20 base weeks and earned at least 1,000 times the minimum wage during that time. Accordingly, an employee who is ineligible for leave under the FLA or the FMLA (such as a part-time employee or an employee of a small business) may

still receive TDBL benefits for time spent caring for a family member, whether or not the employer grants leave.

The TDBL does not require FLA-exempt employers to provide additional leave to employees who seek to take family temporary disability leave under the TDBL. The amended TDBL expressly provides that if “an employer who is not an employer as defined in the [FLA] . . . fails or refuses to restore [an] employee to employment after the period of family temporary disability leave, that failure or refusal shall not be a wrongful discharge in violation of a clear mandate of public policy, and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law, for that failure or refusal.” This amendment is intended to protect FLA-exempt employers from common-law claims, or “public policy” claims—commonly known as “*Pierce claims*” (after *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980))—for having terminated the employment of employees taking family temporary disability leave when they were not otherwise entitled to such leave. Companies should be careful, however, to consider whether such employees would be entitled to leave under any other company policies or laws, such as federal or state laws requiring reasonable accommodation of disabilities.

### **Necessary Actions by Employers**

When an eligible employee takes family temporary disability leave, the TDBL requires the employer to furnish to both the employee and the Division of Temporary Disability Insurance of New Jersey’s Department of Labor and Workforce Development (the Division) “such wage information as the division may require to determine the individual’s eligibility for benefits,” including any sick pay, vacation, or other fully paid time off provided by the employer during the leave period. The employer must provide such information by no later than the ninth day of the employee’s leave. The employee is then responsible for applying for benefits within 30 days of the commencement of the leave period. However, failure to do so will not invalidate the employee’s claim if he or she applies “as soon as reasonably possible” and can demonstrate to the Division that it was not reasonably possible to file within the 30-day timeframe.

An employer may permit or require an employee on family temporary disability leave to use up to two weeks of sick leave, vacation time, or other employer-provided paid leave before the employee becomes eligible for benefits under the TDBL. The employee’s six-week benefits eligibility period may then be reduced by the amount of time spent on employer-provided paid leave. If the employer requires use of such paid leave, the employee may exercise that leave during any one-week unpaid “waiting period” at the outset of the family temporary disability leave period.

Employers must “conspicuously post,” and provide employees with written copies of, notices of the employees’ rights in a form issued by forthcoming regulation.

Employee contributions will fund family temporary disability benefits. Beginning January 1, 2009, employees will contribute 0.09% of their wages to a Division account earmarked to pay for such benefits; these contributions will increase to 0.12% of wages beginning in 2010.

An employer may also seek state approval for a private family temporary disability benefit plan. As with private employee disability benefit plans under the TDBL, such a plan must provide benefits at least equal to those required by the state plan. An employer providing a private plan for payment of family temporary disability benefits may require employees to pay the above-described employee contributions directly to the plan, rather than to the Division.

## Conclusion

Although New Jersey's new paid leave law grants no new right to take leave, employers can expect more workers to exercise their preexisting entitlement now that they will receive pay for at least part of the leave. Accordingly, all employers should review their existing leave policies and benefits, consider how those will interact with the new TDBL, and consider modifications to address the new law before it goes into effect in July 2009.

Morgan Lewis's Labor and Employment Practice regularly advises employers with respect to all aspects of federal and state leave, including the development and implementation of policies, day-to-day guidance under such policies, and litigation of claims under the various leave laws. If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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