

NJ Employers Face New Liability With Leave For Abuse Victims

By **Martin Bricketto**

Law360, New York (August 08, 2013, 8:08 PM ET) -- A recently enacted New Jersey statute guaranteeing unpaid leave for domestic violence and sexual assault victims covers more employers than better-known leave laws and should prompt businesses to update corporate policies and educate managers to avoid serious legal consequences, attorneys said.

Signed by Gov. Chris Christie on July 17, the bipartisan New Jersey Security and Financial Empowerment Act provides up to 20 days of unpaid leave to employees who are victims of domestic violence or a sexual assault and have been with a company for at least one year. A victim's child, parent, spouse or partner in a civil union or domestic relationship is also entitled to that leave time, which must be taken within one year of an incident. The law takes effect Oct. 1.

The measure means new liability worries for employers, because workers can bring civil actions for alleged violations, including leave-related retaliation and discrimination. Generally providing all remedies normally available in common law tort actions, the law includes civil fines and spells out a court's ability to order reinstatement, compensation for lost wages, attorneys' fees and other relief.

"I think what employers need to do ... is to establish a policy, apply it uniformly and consistently, provide a way that employees seeking this leave can do so confidentially — so they can seek the leave without fear of retribution or public disclosure — and then keep accurate records," said Christopher J. Dalton, a partner with Buchanan Ingersoll & Rooney PC.

The N.J. SAFE Act applies to a number of smaller employers that aren't covered by the New Jersey Family Leave Act or the federal Family and Medical Leave Act, noted Adam N. Saravay, a partner with McCarter & English LLP. Whereas those laws apply only to employers with 50 or more employees, the new measure covers businesses with at least 25 employees.

"It may cover some employers who don't have leave policies and aren't familiar with the procedures for leave. For that group of employers, it may be a significant new development," Saravay said.

Michelle Seldin Silverman of Morgan Lewis & Bockius LLP said clients have been asking whether all 25 of those employees have to work in New Jersey for the law to apply. The statutory language doesn't give a clear answer, but the legislative history does reference the Family Leave Act, which defines employers as entities with 50 or more employees anywhere, according to Silverman.

"I would say that the SAFE Act covers employers in New Jersey that have 25 or more employees anywhere. My guess is a lot of people are missing that," Silverman said. "If you're an employer with just a handful of people in New Jersey, you may not realize that you're covered by this."

Even New Jersey employers familiar with the FLA and FMLA will have to adjust to the new allowable reasons for extended or intermittent leaves, according to Joseph O'Keefe, a partner with Proskauer Rose LLP.

"The statutes that we've been dealing with for some time, like the Family Medical Leave Act, permit leave for things like taking care of illness," O'Keefe said. "This expands those reasons to include things like court dates and finding a safe location to live."

A domestic violence victim could also use leave time to seek medical attention or counseling or to obtain legal assistance. Employers are allowed to require documentation of the incident underlying the absence, which could include things like a restraining order or a social worker's certification.

That documentation and other leave information has to be kept confidential, unless the employee voluntarily allows otherwise in writing or some other law requires disclosure.

National employers may be familiar with such rules, because many other jurisdictions have similar laws, noted Daniel Saperstein, also of Proskauer.

Including New Jersey, 11 states and the District of Columbia provide some leave for victims of domestic or sexual violence, according to Silverman, who added that the bulk of those laws were passed around 2007 and 2008.

The bill also includes provisions to alleviate some of the imposition on employers, according to Dalton. Employers can require that employees use paid vacation or personal or medical leave time during any part of the 20 days. Such paid leave would run concurrently with unpaid leave under the statute. Additionally, a leave request covered by both the NJ SAFE Act and the FLA or FMLA would count toward an employee's entitlements under each law.

"It's not adding to the number of days that an employer might take under another leave statute," Dalton said.

Still, the potential of a leave overlapping between the statutes will require extra vigilance on the part of employers, according to O'Keefe.

"It's very important that employers keep accurate records so they understand the purpose of the leave [and] can evaluate whether or not it's a concurrent leave," O'Keefe said.

Businesses will have to provide workers with notice of their rights under the law, as with other employment laws in the state. Companies should stay tuned for specifics on that posting from the state Department of Labor and Workforce Development, Saperstein said.

Any time a new leave law is passed, it's critical for employers to have counsel or human resources staff review their internal policies and ensure they are up to date, according to Silverman. The last thing an employer wants is a written policy that doesn't accurately reflect the law, she said.

Training HR staff and managers on not the way the leave interacts with other laws and the company's own paid time policies will prove important, Silverman added.

“At a minimum, it will help you shield yourself from lawsuits,” she said.

--Editing by Kat Laskowski and Chris Yates.

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