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New Jersey is poised to become the third state to provide paid family leave benefits to employees, meaning increased personnel and administrative costs for all New Jersey employers.

## East Coast Edition

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### New Jersey's Paid Family Leave Law: the Hidden Costs to Employers Doing Business in the Garden State

By David I. Rosen, Bryan M. Churgin and Geida Sanlate

On May 2, 2008, Governor Corzine signed into law the NJ Paid Family Leave Law. New Jersey has joined two other states - California and Washington - in providing employees with paid family leave benefits. Commencing July 1, 2009, the New Jersey law will extend benefits available under the state's Temporary Disability Benefits Law (TDBL) by providing eligible employees with up to six weeks of paid time off during a leave of absence to care for a newborn or newly-adopted child or a family member with a serious health condition.

Unlike the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA), which generally cover the full-time workforce of employers with 50 or more employees, the Paid Family Leave Law covers all New Jersey employers subject to the unemployment compensation law, regardless of the number of employees they employ.

The Paid Family Leave Law will not, in and of itself, grant employees the right to reinstatement after their leave (like the FMLA and NJFLA do) or to sue their employer for violations of the law if post-leave reinstatement is denied. It is anticipated that smaller New Jersey employers, who currently are not required to provide even unpaid family leave, will face new legal challenges, and that all New Jersey employers, regardless of size, will face increased personnel and administrative costs as a result of this new legislation.

### Eligibility and Other Conditions

Employees who have worked at least 20

weeks in covered New Jersey employment or earned in total at least 1,000 times the applicable minimum wage in such employment during the prior year (currently \$7,150 per year) will be entitled to apply for and receive benefits. Eligible employees will be able to collect up to two-thirds of their weekly salary during the leave period (capped at \$524 based on 2008 benefit levels under the TDBL), subject to a one-week waiting period. An eligible absence is defined as one that (1) occurs within 12 months after the birth or adoption of a child or (2) is related to providing care to a family member experiencing a serious health condition, including providing psychological comfort and arranging third-party care for the family member. Consistent with the NJFLA, the Paid Family Leave Law defines *family member* as an employee's child, spouse, domestic partner, civil union partner or parent, and *serious health condition* as an illness, injury, impairment or physical or mental condition requiring inpatient or continuing medical treatment by a health care provider.

Leave that is necessitated by a family member's serious health condition must be supported by a healthcare provider's certification describing the nature and duration of the condition, and employees are required to provide advance notice of their need for leave, with the amount of notice dependent upon the nature of the leave (e.g., at least 30 days advance notice for the birth or adoption of a child). Importantly, the Paid Family Leave Law does not entitle employees to any job protections during or upon returning from a

leave of absence, and employees who are denied leave or refused reinstatement are not entitled to pursue a legal claim based on any adverse action related to a paid leave of absence (unless they otherwise are covered by the FMLA or the NJFLA).

Under the new law, employers will be authorized to substitute up to two weeks of company-provided accrued paid time off benefits for the state-provided paid leave benefits. The first week of such fully paid leave may be used by the employee during the one-week waiting period preceding the receipt of paid family leave benefits. For employers covered by the NJFLA and FMLA, employees can be required to exhaust paid family leave benefits and leave under the FMLA and/or NJFLA concurrently.

## Employer Notification Requirements

Employers will be required to notify employees – through a conspicuous posting and copy of the notification – about their paid leave benefits rights. The employee notice must be issued (1) not later than 30 days after the notification form is provided by the Commissioner of the New Jersey Department of Labor; (2) at the time of the employee's hiring; (3) whenever an eligible employee notifies the employer that the employee is taking covered leave; and (4) at any time, upon the employee's first request for a copy of the notice. Employees and employers may challenge a paid family leave benefits determination by filing objections with the New Jersey Division of Temporary Disability Insurance within seven days after delivery or ten days after the date of the mailing of the determination of benefits eligibility.

## The Hidden Employer Costs

Commencing January 1, 2009, benefits for this new law will be funded through new employee payroll taxes - estimated by the legislative sponsors of the Paid Family Leave Law at \$33 annually per employee. Though employers will not be required to fund the paid leave benefits, it is expected that employers will incur significant administrative costs.

These costs will likely affect more acutely small businesses not covered by the FMLA

and NJFLA. These companies, many of which are not equipped financially to bear increased employee absenteeism, may experience decreased productivity, diminished customer service and higher labor costs occasioned by retaining and training employees to substitute for absent employees.

The Paid Family Leave Law provides solely for income substitution and not an independent right to a protected work leave of absence. The law expressly states that an employee shall not have a common law cause of action against an employer based on its failure or refusal to restore an employee to employment after the period of paid family leave benefits expires. Nonetheless, employees are likely to misconstrue the purpose of and benefits available under this law and may believe erroneously that all employers - including companies not covered by either the FMLA or NJFLA - are required to provide reinstatement once the paid leave period has ended. As a result, it is anticipated that employees who are denied leave rights or reinstatement upon returning from a period of paid leave will pursue frivolous legal claims against their employers, and that companies will bear the cost of defending those claims.

The Paid Family Leave Law also may fuel excessive absenteeism on the part of employees who provide dubious certifications to support their claims for leaves.

## Recommendations

To combat anticipated abuse of the new law, reduce the above-discussed potential administrative costs, and minimize the likelihood that participating employees will initiate legal action relating to a paid leave of absence, we recommend that all employers, including those covered by the FMLA and NJFLA, proactively evaluate, update and implement workplace rules covering leaves of absences. Although it is expected that employers with fewer than 50 employees will deal with these issues more frequently than larger employers, all employers should:

- review existing attendance and leave policies to ensure the policies accurately describe the benefits and limitations of the Paid Family Leave Law;

- establish a lawful administrative process for evaluating and granting/denying leave requests;
- train human resources personnel on the requirements and limitations under the new Paid Family Leave Law;
- ensure the company's policies are applied uniformly when leave is taken for reasons other than the employee's own medical condition;
- monitor and document the amount of paid leave benefits used by individual employees;
- evaluate staffing needs to ensure proper coverage for employees on leave; and
- evaluate reinstatement options.

Until the New Jersey Department of Labor issues interpretive regulations regarding the Paid Family Leave Law, the potential for a legal misstep in administering workplace leaves of absence is high. To avoid running afoul of any legal obligations governing employee leaves of absence, New Jersey employers should consult with employment counsel to ensure that employment policies that may be affected by this statute are up to date, disseminated to all personnel, and uniformly enforced.

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