

Client Advisory | *May 2008*

## New Jersey Becomes Third State to Enact a Paid Family Leave Act

After several years of debate and advocacy on both sides of the issue, New Jersey Governor Jon Corzine signed the Paid Family Leave Act (S-786, A-873) on May 2, 2008, joining California and the state of Washington as jurisdictions with such legislation. The law amends the state's temporary disability insurance law, which provides disability payments to covered employees for their own disability, and provides similar benefits to individuals who are ineligible for unemployment benefits because they are temporarily disabled.



*Barbara A. Lee, Counsel*

The Paid Family Leave Act allows employees of companies of any size to use six weeks of their statutory annual 26 weeks of temporary disability insurance (TDI) to care for ill children, parents, or other family members (as defined by the statute) or to care for a newborn or adopted child. Employees using such leave will be paid two thirds of their wages, up to a maximum of \$524 per week. The law is funded by contributions from employees, which must be withheld by employers and remitted to the State. The Office of Legislative Services, an independent state agency, has estimated that workers will contribute a maximum of between \$25 and \$33 per year. Employers are not required to contribute to the Paid Family Leave Fund.

New Jersey employees working for companies with 50 or more employees have been entitled to 12 weeks of unpaid family leave every two years since 1989 when the New Jersey Family Leave Act (N.J.S.A. 34:11B-1, et seq.) was enacted. That law is enforced by the NJ Division on Civil Rights. The Paid Family Leave law is administered by the NJ Department of Labor and Workforce Development through its Unemployment Compensation division. This new law applies to far more employees than the Family Leave Act or the federal Family and Medical Leave Act (FMLA), although it provides for a shorter period of leave.

### How Does Paid Family Leave Work?

An employee who plans to use Paid Family Leave must first exhaust any existing paid disability leave provided by the employer, such as paid maternity leave. The employer may also require the employee to first use up to two weeks of any paid vacation or sick leave for which the employee is eligible prior to using Paid Family Leave, and may require that the employee take a total of no more than six weeks of paid family leave, irrespective of the source of the payment. Unless the leave is needed for a medical emergency, employees are required to provide the employer with notice at least 15 days in advance of the leave, and the employer may require the employee to provide documentation of the nature of the family member's serious health condition. Employees using Paid Family Leave to care for ill family members may take intermittent leave. Employees planning to use Paid Family Leave for the birth or adoption of a child must give the employer at least 30 days notice, and failure to do so reduces the employee's entitlement to Paid Family Leave by two weeks. Intermittent leave is not permitted for care of a newborn or adopted child and must be taken in one continuous period. It may be taken at any time within one year of the birth or adoption. Employees must take Paid Family Leave concurrently with any unpaid NJ Family Leave Act or FMLA leave for which they are eligible.

### **Who Qualifies as a Child, Parent, or Family Member?**

The statute defines “child” as “a biological, adopted, or foster child, stepchild or legal ward . . . child of a domestic partner . . . or child of a civil union partner . . . who is less than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment.” [Domestic partner and civil union partner are defined in the respective New Jersey laws creating those legal statuses]. A “family member” is “a child, spouse, domestic partner, civil union partner, or parent” of the employee. A “parent” is “a biological parent, foster parent, adoptive parent, or stepparent” of the employee or “a person who was a legal guardian” of the employee when that employee was a child.

### **What Type of Care Must the Employee Provide to the Family Member?**

The employee must demonstrate that the family member has a “serious health condition,” defined as “an illness, injury, impairment or physical or mental condition which requires: inpatient care in a hospital, hospice, or residential medical care facility; or continuing medical treatment or continuing supervision by a health care provider.” The employee must “participate in the providing of care for a family member of the individual made necessary by a serious health condition of the family member, including providing psychological comfort and arranging third party care for the family member,” or be with a child during the first 12 months after the child’s birth or the first 12 months after the placement of the child for adoption with the employee.

### **Does the Employer Pay for the Employee’s Family Leave?**

If the employee has exhausted all paid vacation and sick leave or other paid leave to which the employee is entitled, the employer has no further obligation to pay the employee during the Paid Family Leave because the payments come from the State.

### **What Are the Employer’s Obligations Under Paid Family Leave?**

Employers must notify employees of their rights under the Paid Family Leave Act by posting a notice in the workplace and giving the notice to new employees and to

employees requesting a leave that qualifies under the Paid Family Leave Act. Employers with 50 or more employees must comply with the New Jersey Family Leave Act and the federal FMLA, which require the employer to reinstate the employee to his or her job, or an equivalent position, upon return from family leave. Employers with 1-49 employees have no such reinstatement requirement, but must allow the employee to take Paid Family Leave. The law specifically precludes employees of small companies (under 50 employees) from suing the employer for failure to reinstate them after taking Paid Family Leave (although if the employer has 50 or more employees, it could be sued under the NJ Family Leave Act and/or the federal Family and Medical Leave Act (FMLA) for refusing to reinstate the employee, whether or not the family leave has been paid).

### **When Does the Law Take Effect?**

Employers must begin withholding Paid Family Leave deductions from employees’ paychecks as of pay periods beginning January 1, 2009. The assessment in 2009 will be 0.09 percent of the portion of the employee’s wages that is subject to TDI taxes. The assessment beginning in 2010 will be 0.12 percent. Currently, a maximum of \$27,700 of an employee’s wage is subject to TDI assessment. Employers’ TDI tax rates will not be affected by the amount of their employees’ contributions, which will be allocated to a fund reserved for the payment of Paid Family Leave benefits and administrative costs.

Employers may use a private temporary disability insurance plan to fund their employees’ Paid Family Leave benefits, as long as employee assessments are not greater than under the state plan and as long as benefits are at least equal to those under the state plan. Eligibility criteria for private TDI and paid family leave plans must be the same as those in the Paid Family Leave law.

### **What Are the Employee’s Obligations Under Paid Family Leave?**

The employee must give at least 15 days notice to the employer of the need for paid family leave, unless a medical emergency occurs. The employee must obtain, if requested by the employer, certification from

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the treating medical professional stating 1) the date that the serious medical condition began; 2) the probable duration of the condition; 3) the medical facts regarding the condition; 4) a statement that the employee is needed to provide health care or “psychological comfort” or to arrange third party care; and 5) an estimate of the amount of time that the employee is needed to care for the family member. With respect to intermittent leave, the certification must also state the medical justification for the intermittent leave and its duration, and the dates of treatment, if known. The employee must also provide a schedule of the days that the leave will be taken. Intermittent leave cannot be taken for more than a total of 42 days in any 12-month period. For either continuous or intermittent leaves, the law requires the employee to make a “reasonable effort” to schedule the leave in such a way that the employer’s operations are not “unduly” disrupted.

<sup>1</sup> In order to be eligible for TDI payments, the employee must have worked for the employer for at least 20 weeks and must have earned at least \$103 per week in each of those weeks. Payments are made to employees whose temporary disability prevents them from working; the disability must not be related to the individual’s job.

<sup>2</sup> The Department of Labor and Workforce Development has not yet issued regulations with respect to the particulars of the medical certification. The FMLA’s “Certification of Health Care Provider” (Form WH-380) appears to cover the information required by the NJ Paid Family Leave Act, and could be used while the new regulations are pending. The form can be found at <http://www.dol.gov/esa/regs/compliance/whd/fmlr/wh380.pdf>.

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This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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