

# FMLA and NJ Paid Family Leave Update – New Responsibilities For Employers

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# Agenda

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- New Servicemember Family Leave Provisions
- DOL's proposed FMLA regulations
- Common FMLA and absence control problems
- NJ Paid Family Leave Act
- Interaction between FMLA, ADA and other laws related to leave

# Servicemember Leave

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- Jan 11, 2008 – President Bush signed the National Defense Authorization Act (NDAA)
- Section 585(a) of NDAA amended FMLA
  - Provides up to 26 weeks of leave to care for family member injured in the line of duty during any 12-month period



# Servicemember Leave

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- Employers must inform employees of eligibility within five (5) business days of requests or notice of an FMLA eligible condition
- Medical certification can be required as a condition for granting leave
- Leave can be taken continuously or intermittent basis

# FMLA Regulations

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- FMLA required DOL to issue implementing regulations within 120 days
- Interim Final Rule issued: June 4, 1993
- Public comment period
- Final Regulations effective: April 6, 1995

# Proposed Regulations

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- DOL issued a Notice of Proposed Rulemaking on February 11, 2008
- Based on 15 years administering FMLA, two DOL studies, court decisions, and public comments

# Problems with FMLA

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- Burdensome administration
- Unplanned absences
- Lost productivity
- Interference with morale
- Third party administrators that issue erroneous and/or confusing notices



# Joint Employer Coverage

## 825.106(b)

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- Proposed amendment to 825.106(b) clarifies eligibility based on joint employer status
- “Professional Employer Organizations (PEO’s)” that perform only administrative functions are not “joint employers”

# Joint Employer Status

## 825.106(b)

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- Typical administrative functions:
  - Payroll
  - Benefits
  - Regulatory paperwork, including I-9s, W-2s; documenting hours worked, etc.

# Eligible Employee

## 825.110

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- Retains rule that one must have 12 months of service and 1250 hours in 12 months prior to leave and work at site where there are 50 or more employees within 75 mile radius
- DOL proposes that break in service of five years or more need not be counted

# Eligible Employee

## 825.110

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- Response to *Rucker v. Lee Holding* (1st Cir. 2006) decision allowing five year break of service
- Imposed burden on employers to aggregate non-consecutive service to establish “12 months of service”

## Two Exceptions to Proposed Break in Service Rule

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- Break in service resulting from fulfillment of military obligations
- Period of approved absence or unpaid leave, where written agreement or labor contract exists regarding intent to rehire employee

# Serious Health Condition

## 825.113(d)

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- Addresses conditions not ordinarily expected to be covered and when they can become covered due to complications
  - E.g. - Common cold, flu, ear aches, upset stomach, minor ulcers, headaches, etc. unless an incapacity of more than three consecutive calendar days that also involves qualifying treatment

# Serious Health Condition

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- Illness, injury, impairment or physical or mental condition that involves:
  - Inpatient care, or
  - Continuing treatment by health care provider (HCP) – currently: incapacity of three consecutive calendar days; visit to HCP and a regimen of treatment or two visits to HCP (open ended)

# Continuing Treatment

## 825.115

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- DOL proposes that the two visits to a health care provider must be within 30 days of period of incapacity unless there are extenuating circumstances

# Physician Assistants

## 825.125

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- DOL proposes that physician assistants (PA) be added to the list of HCP's
- Amendment would delete requirement that PA's operate "without supervision by a doctor or other HCP"

# Employer Notice Requirements

## 825.300

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- DOL proposes that one document can be used in both employee handbook (if one exists) and posting to satisfy distribution and posting obligations
- If notice is not contained in employee handbook, must be distributed annually

## Employer Notice Requirements *(cont'd)*

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- DOL proposes that employer's failure to timely notify employee of FMLA rights may result in interference with, restraint of, or denial of use of leave
- If employee can show individual harm as a result of failure to provide notice, employee may be entitled to remedies

# Retroactive Designation

## 825.301

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- DOL allows retroactive designation of FMLA leave unless showing of individual harm
- But, if employer fails to timely designate and employee establishes harm, remedy may be available

# Response to Ragsdale

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- *Ragsdale v. Wolverine*, 535 U.S. 1155 (2002) (striking federal regulation insofar as it expanded the statutory allotment of 12 weeks leave).



# Federal Regulation

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- “If an employee takes ...leave and the employer does not designate....as FMLA leave, the leave taken does not count against the employee’s FMLA entitlement.” 29 CFR 825.700(a)

# Regulation Deemed Invalid

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- Regulation deemed invalid because it relieved employee's burden of showing impairment
- No prejudice to employee who would have taken 30 weeks even if notice given
- Penalty is unrelated to harm

# Medical Certification

## 825.305

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- DOL proposes clarification: that 15 days for both foreseeable and unforeseeable leave
- Proposes extension of time for employer to request certification from two business days to five business days
- Consequences for incomplete certification
  - Where “vague, ambiguous or non-responsive” certification is submitted, it is employee’s responsibility to correct, or FMLA may be denied

# Problem Areas

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- Employee does not know when they will be returning
- Employee fails to provide adequate leave documentation
- Employer learns that leave was not covered after it has granted FMLA leave

# Unsure of Return Date

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- Seek medical certifications and follow up on status
- Federal regulations contemplate communication regarding employee's condition
- Document communications



# Inadequate Documentation

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- Provide employees with reasonable opportunity to cure incomplete or inadequate leave papers
- If appropriate, seek second (or third) medical opinion



# Failure to Request FMLA

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- No magic words required by employee
- Information must simply be sufficient to place employer on notice that leave would be for an FMLA purpose
- But, if insufficient notice, then FMLA rights may be denied

# Post-Ragsdale Decisions

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- After Ragsdale, if employee is terminated during 12-week leave but would not have been able to return following leave, no FMLA violation
  - *Katekovich v. Team Rent A Car*, 36 Fed. Appx. 688, 689 (3d Cir. 2002)

# Post-Ragsdale Decisions

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- Employer entitled to rely on medical certification stating employee was unable to return to work until after the conclusion of her FMLA-qualified leave; termination did not violate FMLA
  - *Rogers v. New York Univ.*, 2002 WL 2031567 (S.D.N.Y. 2002)

# Questions?

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# New Jersey Paid Family Leave Act



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# Background

- Signed into law by Governor Corzine on May 2, 2008
- New Jersey is the third state (after California and Washington) to mandate a paid family leave program



# Background

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- Allows an eligible employee to use six weeks of the employee's statutory 26 weeks of state-paid temporary disability insured-leave (TDI) for family purposes rather than for the employee's own disability
- Employees will be paid 2/3 of their weekly wage, up to a maximum of \$524 per week by the state

# Background

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- Effective Dates:
  - Payroll deductions begin on January 1, 2009
  - Benefits become available to employees on July 1, 2009

# Which Employers are Covered?

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- All employers subject to the NJ Unemployment Compensation Law
- There is no 50-employee threshold, as is found in the Family and Medical Leave Act or the New Jersey Family Leave Act

# Which Employees are Covered?

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- All employees who have worked for 20 calendar weeks in New Jersey at a rate of pay of at least \$143 per week
- All employees who have earned at least 1,000 times the New Jersey minimum wage (currently \$ 7.15 per hour, increasing to \$7.25/hour on 7/24/09) during the 52 weeks preceding the leave

# Permissible Reasons to Take Leave

- Care for a newborn within 12 months of birth
- Care for a newly adopted child within 12 months of placement
- Care for a family member with a serious health condition



# Who is a Family Member?

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- Spouse
- Civil union partner
- Domestic partner
- Parent
- Child under 19 years of age
  - Biological - Stepchild - Foster child
  - Adopted - Legal ward
  - Child of domestic partner or civil union partner

# Who is a Parent?

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- Biological parent
- Foster parent
- Adoptive parent
- Stepparent
- Person who was a legal guardian of the employee when that employee was a child



# What is “Care for?”

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- Physical care
- Emotional support and comfort
- Visitation
- Assistance in treatment
- Transportation
- Arranging for a change in care
- Assistance with daily living
- Personal attendant service



# What is a “Serious Health Condition?”

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- Illness
- Injury
- Impairment
- Physical or mental condition that requires:
  - Inpatient care in a hospital, hospice, or residential medical care facility
  - Continuing medical treatment or continuing supervision by a health care provider



# How Much Leave is Allowed?

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- Six weeks maximum in any 12-month period
- 42 days during any 12-month period if leave is taken on an intermittent basis

# How Does the Leave Work?

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- Employer may require employee to first use up to two weeks of paid vacation or sick leave for which the employee is eligible prior to taking paid family leave
- Employer may limit employee's paid family leave to a total of six weeks irrespective of source of payment
- Employer may permit employees to use all available fully paid time off accrued pursuant to company policy before using Paid Family Leave

# How Does the Leave Work?

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- Notice:
  - Employees using consecutive leave must provide notice “in a reasonable and practical manner” absent emergency
  - Employees using intermittent leave must give at least 15 days notice of intent to use the leave unless there is a medical emergency
  - Employees using leave for birth or adoption of a child must give at least 30 days notice or lose two weeks of paid leave



# How Does the Leave Work?

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- Employer may require employee to provide documentation of the nature of the family member's serious health condition
  - Date that the serious medical condition began
  - Probable duration of the condition
  - Medical facts regarding the condition
  - Statement that employee is needed to provide health care or comfort or to arrange third party care
  - Estimate of amount of time needed for the care
  - For intermittent leave, dates of treatment

# How Does the Leave Work?

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- Employees caring for family members may use intermittent leave
- Intermittent leave is not permitted for care of newborn or adopted child and must be taken in one continuous period
- Leave to care for a newborn or adopted child must be taken within one year of the birth or adoption

# What Must Employee Do?

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- Give the employer a schedule of days that the leave will be taken
- Make a “reasonable effort” to schedule the leave in such a way that the employer’s operations are not “unduly” disrupted

# What Must the Employer Do?

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- Post a notice about employee rights under the Paid Family Leave Act
- Give the notice to all new employees and to employees requesting a leave that qualifies under the Paid Family Leave Act



# What Must the Employer Do?

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- Beginning January 1, 2009, withhold Paid Family Leave deductions from employees' paychecks. For 2009, assessment will be 0.09 percent of the portion of the employee's wages that is subject to TDI taxes (currently a maximum of \$27,700). For most employees, should total \$25-\$33
- Continue to pay the employer's portion of TDI contributions

# What if Employer Has a Private Temporary Disability Plan?

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- These plans may still be used, 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 may not be stricter than those in the Paid Family Leave law

# What if Employer Has a Private Temporary Disability Plan?

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- Private plans must be approved by the State
- Employers must submit private plans to State at least 90 days prior to date plan is to become effective

# What is the State's Role?

- Collect employee contributions and allocate to a special fund for paid family leave payments
- Require a one-week waiting period for benefits. If leave continues for three weeks, employee will receive benefits for the first week
- At State's discretion, require employee to have relative examined by state-designated provider at state's expense to determine existence of serious medical condition



# Interplay with FMLA and NJ FLA

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- Both FMLA and NJ-FLA apply only to employers with 50 or more employees, while Paid Family Leave applies to employers of all sizes
- Both FMLA and NJ-FLA require employer to reinstate the employee (unless certain conditions are met). There is no reinstatement requirement under NJ Paid Family Leave Act.

# Interplay with FMLA and NJ-FLA

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- Paid Family Leave Act specifically provides that employees working for companies with fewer than 50 employees may not sue their employers under this law for failure to reinstate them after taking the leave
- Employees must take Paid Family Leave concurrently with any unpaid NJ-Family Leave or FMLA for which they are eligible

# Interplay with FMLA and NJ-FLA

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- FMLA applies to employee's own serious health condition as well as that of family members
- NJ-FLA and NJ Paid Family Leave Act apply only to serious health conditions of family members. Employee must use sick leave or TDI for employee's own medical conditions that make him/her unable to work

# Interplay with FMLA and NJ-FLA

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- Paid Family Leave law does not affect relationship between FMLA and NJ-FLA: if employee exhausts NJ-FLA leave and Paid Family Leave (taken concurrently), may still be eligible for FMLA leave for his/her own serious medical condition if unable to work

# Interplay Among FMLA, NJ-FLA, and Paid Family Leave

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- All three laws may impose an obligation upon the employer to grant an individual a leave of absence up to a statutory maximum
- An employee with a serious health condition that also qualifies as a disability may be protected under both the ADA and the FMLA
- U.S. Department of Labor regulations state that the employer must provide the leave under the law that affords the greater protection to the employee; in many cases, this will be the FMLA.

# Interplay Among FMLA, NJ-FLA, and Paid Family Leave

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- The FMLA's definition of "serious health condition" is much broader than the ADA's definition of "disability"
- Therefore, an individual who is eligible for FMLA leave might not be classified as disabled for purposes of the ADA
- But an individual who has a serious health condition and is unable to work would not be eligible for Paid Family Leave

# What are the Employer's Rights if the Employee Does Not Return?

- Under FMLA, an employee who cannot return to work and perform the essential functions of his/her job after the statutory 12 weeks of leave has expired may be discharged
- Under NJLAD, an employee whose disability leave has expired and who cannot "presently perform" the essential functions of the job may be discharged (interactive process required)
- Under Paid Family Leave, an employer with fewer than 50 employees has no legal obligation to reinstate the employee

# In a Nutshell

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- FMLA - for employee's own disability or to care for an ill family member or new child - 12 weeks per year
- NJ-FLA - employee must be able to work, but is needed to care for ill family member - 12 weeks every two years; may be "stacked" on FMLA if FMLA taken for own disability first
- NJ Paid Family Leave - employee must be able to work, but is needed to care for ill family member - six weeks of paid leave, per year - is concurrent with other laws
- ADA - employee's disability may require a leave as a reasonable accommodation; no statutory limit on leaves as accommodations

# Questions?

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