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Paid Family Leave Available July 1, 2009

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Along with the federal Family Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA), beginning July 1, 2009, employers will be subject to a third statute that permits employees to take leave to care for a family member with a serious health condition or a newborn or newly-adopted child. This past year, New Jersey enacted the Paid Family Leave Act (PFLA). New Jersey is the third state, behind California and Washington, to enact a paid leave statute. The changes occasioned by the PFLA will be funded entirely through employee payroll taxes with no contribution from employers. Beginning January 1, 2009, a .09% tax was applied to employee wages.

There are a number of distinctions between the FMLA and the NJFLA and the newly enacted PFLA. Most notably, the PFLA mandates *paid* leave for qualifying employees. Also unlike the FMLA and NJFLA, the PFLA applies to all employers regardless of the number of employees.

In order to be eligible for paid leave under the PFLA, an employee must have worked at least 20 weeks or earned 1,000 times the minimum wage (\$7,150) within the previous year. A qualifying employee will be eligible for up to six weeks of paid leave during a 12-month period. Leave can be taken intermittently to care for a family member with a serious health condition so long as the leave period does not exceed one year.

Employees can take leave in two ways. First, the PFLA is triggered when an employee takes leave to care for a family member with a serious health condition. "Family member" is defined expansively to include the employee's child, spouse, parent, and civil union or domestic partner. A "serious health condition" means an illness, injury, impairment or physical or mental condition that requires continuing medical treatment or continuing supervision by a health care provider.

To be covered by the PFLA, an employee must provide notice of leave in a reasonable and practicable manner. In the case of intermittent leave, an employee must provide the employer with 15 days notice prior to the day that benefits are paid, unless unforeseen circumstances preclude such notice. The employee is also (*cont'd* ➔)

obliged to make a reasonable effort to schedule the leave so as to not unduly disrupt the employer's operation. Furthermore, the employee must submit a certification issued by the health care provider, stating the date on which the serious health condition commenced, the probable duration of the condition, medical facts regarding the condition, a statement that the condition requires the participation of the employee, and an estimation of the amount of time that the employee needs to participate in the care. If the employee's leave is intermittent, the certification must also state the medical necessity for intermittent leave and planned dates of treatment.

Second, employees are entitled to paid leave to care for a newborn or newly-adopted child. In this instance, the employee is required to provide the employer 30 days notice of leave. Leave can be taken at anytime within the year following the birth or adoption of the new child. With the birth/adoption of a new child, intermittent leave is not permitted unless the employer consents and the arrangement is disclosed to the State.

Under either scenario, employers can require that employees exhaust up to two weeks of paid leave under the employer's usual policy. After the expiration of those two weeks, a qualifying employee is entitled to an additional six weeks of paid leave under the PFLA. To the extent the employee is also entitled to leave under the NJFLA or the FMLA, any such benefits will be taken concurrently with the PFLA. During the six-week period, the employee will be allowed two thirds of his/her salary, up to \$524 per week based upon 2008 benefit levels and up to \$546 per week based upon 2009 benefit levels.

Also in contrast with the NJFLA and the FMLA, the PFLA does not grant the employee the right to be reinstated in the same or equivalent position upon the conclusion of the paid leave. An employee that nonetheless qualifies under the NJFLA and the FMLA is entitled to reinstatement rights. Practically, this means that employees who are terminated while on paid leave do not have a cause of action against their employer if their employer employs less than fifty employees.

As to the employer's notice responsibilities, notification of the PFLA must be conspicuously posted in a place accessible to all employees. Additionally, the employer must distribute a written notification when a new employee is hired or when an employee requests time off for leave that would be covered by the PFLA.

It should also be noted that the PFLA does not operate as a bar to collective bargaining agreements that provide for more generous leave policies for employees. In such a circumstance, the provisions of the collective bargaining agreement will govern.

In anticipation of the implementation of the PFLA, employers should review and revise their current policies to ensure compliance with the new law. This includes developing new administrative policies and payroll functions. Additionally, employers should prepare to address increased temporary leave by their employees.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Athina Lekas Cornell of the EdLaw Group at edlawgroup@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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