

New Hurdles for N.J. Employers Seeking To Comply with Paid Leave Law

By Jonathan Stoler and Lisa M. Lewis

In 2008, New Jersey became the third state, after California and Washington, to enact a paid family leave law. The New Jersey paid leave law amended New Jersey's existing Temporary Disability Benefits Law to provide Family Leave Insurance (FLI) benefits to eligible employees for up to six weeks of paid leave in a 12-month period in order to care for a family member with a serious health condition or to bond with a newborn or adopted child. The paid leave law became fully effective on July 1, 2009, and FLI benefits are now available to eligible employees.

In most cases, FLI benefits are paid for by the State of New Jersey through its existing Temporary Disability Insurance (TDI) program. FLI benefits are funded by employee contributions in the form of a payroll tax that is withheld from employees' wages. Employers were required to begin withholding 0.09 percent of their employees' taxable wages as of Jan. 1, 2009, increasing to 0.12 percent as of Jan. 1, 2010.

As an alternative to participating in the state TDI program, employers can arrange for coverage by a private insurance carrier. Under state regulations, however, choosing a private plan is not a simple alternative to participation in the state TDI program. As explained in detail below, bypassing the state TDI program requires, among other preconditions, that an employer obtain approval from the New Jersey Division of Temporary Disability Insurance, conducting an election among covered employees and establishing a trust fund account for employee contributions.

This article provides an overview of the basic structure and key provisions of New Jersey's paid leave law. In addition, this article discusses the requirements imposed on an employer seeking to implement a private insurance plan to cover FLI benefits.

Overview of N.J.'s Paid Leave Law

An employee is eligible for FLI benefits in New Jersey to care for a family member with a serious health condition or to bond with a newborn or newly adopted child. Employees and employers must satisfy their respective notice requirements.

Eligibility and Benefits

Employees of all private and governmental employers subject to the New Jersey Unemployment Compensation Law are eligible for FLI benefits, regardless of the employer's size. In other words, all employees who were employed by a New Jersey employer for at least 20 calendar weeks and who earned at

least \$145 in each of those weeks or earned at least 1,000 times the state hourly minimum wage during the prior year are eligible to receive FLI benefits. It's worth noting that eligibility under both the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA) is far more restrictive. First, the FMLA and NJFLA apply only to employers with 50 or more employees. Second, to be eligible for leave benefits, an employee must have worked for an employer for 12 months for a minimum of 1,250 hours under the FMLA and must have logged a minimum of 1,000 work hours over the past 12 months under the NJFLA.

The New Jersey paid leave law does not confer upon employees any entitlement to leave, but instead establishes a monetary benefit.

The FLI program does not confer upon employees any entitlement to leave, but instead establishes a monetary benefit for which employees may file a claim with the state or with a private plan provider. If an employee is eligible for both paid leave under the new law and unpaid leave under the FMLA or the NJFLA, the paid leave runs concurrently with the unpaid leave. Accordingly, an employee would receive FLI benefits for the first six weeks, and any remaining leave after six weeks would be unpaid. Eligible employees will receive up to two-thirds of their salary, up to the 2010 maximum of \$561 per week, during the paid leave.

There is a one-week waiting period for receiving FLI benefits. If the leave period extends beyond three weeks, the employee will be paid retroactively for the one-week waiting period.

Covered Leave

An eligible employee can receive FLI benefits for leave taken in order to care for a family member with a serious health condition. Under the paid family leave law, a "family member" includes a child, spouse, domestic partner, civil union partner or parent of a covered individual. A "child" is defined as a biological, adopted or foster child, a stepchild or a legal ward

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Failure to Provide Notice of Bonding Leave Will Result in Reduced Benefits

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of a covered individual; a child of a domestic partner of the covered individual; or a child of a civil union partner of the covered individual who is younger than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment.

A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that requires inpatient care in a medical care facility or continuing medical treatment or continuing supervision by a health care provider for a condition that prevents the qualified family member from participating in school, employment duties or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment; incapacity due to pregnancy; or incapacity due to a chronic condition.

“When leave is taken to care for an employee’s seriously ill family member, the employee must provide certification.”

In addition to leave to care for a family member with a serious health condition, an employee is also eligible for FLI benefits for leave taken to bond with a newborn or newly adopted child. Specifically, a covered individual can file for FLI benefits in order to bond with a child during the first 12 months after the child’s birth, if the covered individual or domestic partner or civil union partner of the covered individual is a biological parent of the child. A covered individual also can file for FLI benefits during the first 12 months after the placement of a child for adoption with the covered individual.

Continuous vs. Intermittent Leave

Leave to care for a seriously ill family member can be taken during one continuous period, up to a maximum of six weeks, or intermittently when medically necessary. When leave is taken intermittently, it is limited to a maximum of 42 days in a 12-month period. Leave for the purposes of bonding with a newborn or newly adopted child must be taken during one continuous period unless both the employee and the employer

have agreed to an intermittent leave schedule. In those cases, leave can be taken in non-continuous periods of seven days or more and must be taken during the 12-month period immediately following the birth or adoption of the child.

Employees intending to take leave to bond with a newborn or newly adopted child must provide the employer with a minimum of 30 days’ notice prior to commencement of the requested leave. Failure to provide such notice will result in a two-week reduction of the employee’s maximum FLI benefits, unless the time of the leave is unforeseeable or the time of the leave changes for unforeseeable reasons.

When employees intend to take continuous leave to care for a seriously ill family member, they must provide the employer with prior notice of the leave in a reasonable and practicable manner, unless an emergency or other unforeseen circumstance precludes prior notice.

Employees planning to take intermittent leave to care for a seriously ill family member must provide the employer with a minimum of 15 days’ notice unless an emergency or other unforeseen circumstance precludes prior notice. Notably, the regulations do not currently allow for a reduction in benefits for failure to provide the 15 days’ notice.

When leave is taken to care for an employee’s seriously ill family member, the employee must provide certification by a health care provider describing the nature and duration of the family member’s medical condition, the need for the employee’s participation in providing care and how much time the employee will need for such care.

Employer Notice Requirements

Employers are required to post written notice of employees’ rights relating to FLI benefits in an area accessible to all employees. In addition, employers were required to distribute written notification of employees’ rights to each employee by April 1, 2009, and are required to provide written notification on an ongoing basis each time an employee is hired or whenever an employee requests or provides notice of leave. Notices for posting and distribution are available on the web site for the New Jersey Department of Labor and Workforce Development at lwd.state.nj.us/labor/fli/content/emp_requirements.html.

Funding

FLI benefits are funded by employee contributions. In 2009, employers participating in the state TDI program were required to withhold 0.09 percent from employees’ taxable wages, up to a maximum of \$28,900 in wages. The payroll tax increased to a rate of 0.12 percent in 2010. Under the current law, employers do not contribute to the program, but there is concern that the

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N.J. Employers May Choose to Provide FLI Benefits Under Private Plans

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law could be amended in the future to require employers to contribute if the employee contributions prove to be insufficient.

Paid Time Off

An employer may require an employee to use up to two weeks of paid sick leave, paid vacation time or other leave at full pay during a period of family leave. An employer cannot require the employee to use more than two weeks of paid sick leave, vacation time or other leave at full pay, but an employer may permit an employee to use more than two weeks of paid time off. Moreover, an employer remains bound by any relevant collective bargaining provisions that pertain to paid time off.

FLI benefits cannot be paid for any day that an employee receives wages or other paid time off at full pay. When an employer requires that an employee use paid time off at full pay, the employer may request that the employee's maximum FLI benefit be reduced by the number of days of leave at full pay, up to two weeks, required to be used by the employer.

No Job Protection

The New Jersey paid family leave law does not provide job protection to employees. The FLI program is a partial wage replacement for employees who cannot work because of the need to care for a child, parent, spouse or domestic partner, or to bond with a newborn or newly adopted child. As a result, employers are not required to hold employees' jobs while they are on leave or to restore employees to their employment at the expiration of their leave. Nonetheless, employers, especially employers with 50 or more employees, may be required to restore employees to their employment under other applicable laws, including the FMLA or the NJFLA.

Private Plans

As with the state TDI program, an employer can choose to provide employees with FLI benefits coverage under a private insurance plan approved by the Division of Temporary Disability Insurance of New Jersey's Department of Labor and Workforce Development. As discussed below, however, the approval process and other requirements may make private plans too burdensome for employers to implement.

Minimum Requirements

As an initial matter, benefits provided under a private plan must equal or exceed the benefits provided to employees under the state TDI program.

In other words, employees must be provided with at least six weeks of paid leave in a 12-month period. Eligibility requirements for employees covered under a private plan cannot be any more restrictive than they are for employees

who are covered under the state TDI program. The cost to employees covered under a private plan cannot exceed the cost to employees covered under the state TDI program.

Employers choosing a private insurance plan to cover FLI benefits instead of participating in the state TDI program were required to submit applications seeking approval from the division prior to Jan. 1, 2009. New employers or employers seeking to switch from the state TDI program to private insurance must submit applications for approval to the division before providing coverage under a private plan.

Written Election

Prior to submitting applications for approval, employers must conduct an election among covered employees as to whether they consent to be covered by a private plan. The division will not approve a private plan unless a majority of employees covered have agreed to such coverage in a written election.

As a result, employers must submit evidence of having conducted the written election along with their applications, including copies of ballots or other documents as evidence of the employees' consent. Moreover, after an election an employer must post the results of the election for its employees and maintain all records pertaining to the election during the duration of any private plan coverage.

Notice About Private Plan

Under the regulations, employers choosing a private insurance plan must post notice describing the benefits available to employees under the private plan, including eligibility requirements, current rates, the maximum amount and duration of the benefits, the contribution required and appeal rights.

Employers also must provide a copy of the notice to all employees and submit a copy to the division on an annual basis. A form notice is available from the division.

Funding for Private Plans and Claims Process

Employees covered under approved private plans cannot have contributions deducted from their wages for FLI benefits coverage unless a majority of the employees consent to contribute to the approved private plan. If a majority of employees consent to contribute to the private plan, the contributions cannot exceed those paid by workers covered under the state TDI program. As a result, in 2009 employee contributions could not exceed 0.09 percent of taxable wages, up to a maximum of \$28,900 in wages. As set forth above, the maximum employee contribution increased to 0.12 percent in 2010, up to a maximum of \$29,700 in wages.

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Concerns Remain About How Much N.J. Law Will Cost Employers

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All employee contributions to a private plan must be deposited in a trust fund account. The trust fund account is to be used only for payment of FLI benefits. An employer cannot consider the trust fund account to be part of its assets. Further, the employer must make the trust fund account available for inspection and possible audit by the division.

Employers must provide the necessary claim form to any employee covered by a private plan who wishes to file a claim. All claims decisions will be made by the private insurer. Any employee who disagrees with a claim decision made by a private insurer can file a complaint with the division in its Private Plan Compliance Section.

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Administrative Considerations

Before embarking on the process for approval of a private insurance plan, employers should carefully consider the potential costs, time commitments and administrative hurdles associated with the approval process. The costs and time associated with conducting a written election may be considerable depending on the size of the employer's workforce.

The employer also should consider the obligations involved in properly maintaining the required records and managing the mandatory trust fund associated with a private insurance plan. While the burdens associated with choosing a private insurance plan are not insurmountable, participating in the state TDI program certainly may be the less burdensome option for some employers.

Hidden Costs

New Jersey's paid family leave law poses a host of new concerns for New Jersey employers with regard to the already complicated area of employee leave. Although the new law does not confer additional entitlement to leave on employees, it does grant eligible employees the right to receive FLI benefits for up to six weeks of paid leave in a 12-month period in order to care for a family member with a serious health condition or to bond with a newborn or adopted child. These FLI benefits will undoubtedly make it more attractive for employees to

take advantage of leave available to them under the FMLA or the NJFLA, and more affordable to do so for longer periods of time. To cover longer or more frequent leaves, it may be necessary for some employers to hire permanent or temporary replacements or to train employees to handle multiple positions. Thus, although employers are not currently required to contribute to the funding of FLI benefits, the new law could make it more costly for New Jersey employers to do business.

In addition to facing potential increases in the number and duration of employee leaves, employers also must devote additional time and resources to ensuring compliance with various administrative requirements under the new paid leave law. In particular, employers must make certain that they have taken the following actions:

- Employers participating in the state TDI program are required to withhold 0.12 percent from employees' taxable wages in 2010, up to a maximum of \$29,700 in wages.
- Employers considering coverage under a private plan must conduct a written election to get the consent of employees to be covered by a private plan and to contribute to a private plan. Once consent is obtained by employee election, employers must submit evidence of the election along with an application for approval to the Division of Temporary Disability Insurance.
- Employers approved for coverage under a private plan must establish a trust account for employee contributions and ensure that the trust account is properly administered.
- Employers are required to post written notice of employees' rights relating to FLI benefits in an area accessible to all employees.
- By April 1, 2009, employers were required to distribute written notification of employees' rights relating to FLI benefits to all employees.
- Employers are required to provide written notification on an ongoing basis each time an employee is hired or whenever an employee requests or provides notice of leave.

Employers should consider updating employee handbooks and policies to reflect the new paid leave law.



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