



Family and Medical Leave Act v. New Jersey's Family Leave Act

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Welcome To The Garden State New Jersey Employment Law For The Out-Of-State Employer

This is the third in a series of Alerts we are preparing to help acclimate out-of-state employers to the nuances of New Jersey law. We appreciate any feedback to help us better serve both our New Jersey based and out-of-state clients.

Family and Medical Leave Act v. New Jersey's Family Leave Act

The federal Family and Medical Leave Act ("FMLA") and the New Jersey Family Leave Act ("FLA") may both cover employers in New Jersey. While the statutes are similar, employers with employees in New Jersey should be aware of certain important differences.

Which employers are covered by the FLA?

The FLA applies to employers who employ 50 or more employees for 20 or more workweeks during the current or preceding calendar year. N.J.S.A. 34:11B-3(f). Although the statute itself is silent on the issue of whether those 50 employees must also work in the Garden State, regulation and case law both provide that employees in any state count towards the 50-employee threshold. Thus, the scope of coverage is broader than under the FMLA, which limits coverage to employers with 50 or more employees within 75 miles of a given employee's workplace. 29 U.S.C. 2611 (2) and (4).

Which employees are covered?

An employee is covered under the FLA if he or she has been employed within New Jersey by a covered employer for 12 months and worked for at least 1,000 hours during the 12-month period immediately preceding the leave. N.J.S.A. 34:11B-3(f); N.J.A.C. 12:14-1.2. This is more generous than the FMLA, which requires that employees work 1,250 hours in the 12-month period immediately preceding the leave. 29 U.S.C. 2611 (2).

Provisions for the coverage of highly-paid employees also differ. Under the FLA, the most highly compensated 5% of employees in a company, or any one of the 7 highest compensated employees, may be denied leave if necessary to prevent substantial and grievous economic injury to the employer's business. In order to invoke this exception the employer must notify the employee of its intent to deny the leave when it determines that the denial is necessary. N.J.S.A. 34:11B-4h. Under the FMLA, an employer may not deny highly-paid employees leave, but the most highly compensated 10% of employees in a company may be denied restoration to employment if necessary to prevent substantial and grievous economic injury. An employer must notify an employee that restoration may be denied upon his or her request for leave. 29 U.S.C. 2614(b).

Key differences in coverage

In addition to differences in coverage as to employees and employers under the FMLA and FLA, the two laws provide different coverage in several ways.

The amount of leave provided to covered employees is different. Under the FLA, covered employees are eligible for 12 weeks of leave during any 24-month period. N.J.S.A. 34:11B-4. There is no reduction in the leave requirement when the same employer employs multiple employees from the same family. N.J.A.C. 13:14-1.12. Under the FMLA, covered employees are eligible for up to 12 weeks leave during any 12-month period, but spouses working for the same employer are limited to a total of 12 weeks of leave for the birth or placement of a child or to care for a parent. 29 U.S.C. 2612.

The familial relationships eligible for leave also differ. Under the FLA, an employee may not take leave for his or her own serious medical condition, while under the FMLA this leave is permitted. N.J.S.A. 34:11B-4; 29 U.S.C. 2612. The FLA includes parents-in-law in the definition of family member; the FMLA does not. N.J.S.A. 34:11B-4; 29 U.S.C. 2612. The FMLA permits leave for placement of a child in foster care; the FLA does not. 29 U.S.C. 2612; N.J.S.A. 34:11B-4.

The FMLA and FLA also differ on the timing of leave for birth or placement of a child. Entitlement to leave under the FMLA expires 1 year after birth or placement, whereas under the FLA leave must begin within 1 year of birth or placement. 29 U.S.C. 2612(a)(2), N.J.S.A. 34:11B-4(c). The FMLA also has extensive provisions regarding leave for employees whose family members are active duty members of the armed forces, which are not mirrored in the

FLA. 29 U.S.C. 2611(14) and (15); 29 U.S.C. 2612.

The FMLA and FLA also differ in their provision of intermittent and reduced leave. Generally, the FMLA has fewer restrictions on these types of leave, and to the extent the provisions conflict, the FMLA preempts the FLA. Under the FMLA, reduced leave, which is a leave schedule that reduces the number of hours per week or day an employee works, is permitted for serious health conditions where medically necessary. 29 U.S.C. 2611(9); 29 U.S.C. 2612(b). Under the FLA, leave may only be taken in increments of one work day unless otherwise agreed to by the employee and employer and may only be scheduled for 24 consecutive weeks within any 24 month period. N.J.S.A. 34:11B-3 and B-5. An employee may take intermittent leave under the FMLA for serious health conditions for a period of time from one hour to several weeks with no limit on the amount of leave taken on an intermittent basis. 29 U.S.C. 2612 (b). Under the FLA, intermittent leave must be taken in intervals of at least one week and be taken within a 12-month period for any given health condition. N.J.S.A. 34:11B-4. Under both statutes, neither reduced nor intermittent leave may be taken for a healthy birth or adoption, unless the employer consents. 29 U.S.C. 2612(b); N.J.S.A. 34:11B-4.

At times, an employee may be entitled to separate leave under both the FLA and the FMLA within the same 12-month period because the initial leave is not covered under both statutes. This is commonly referred to as “stacking” leave. For example, leave taken as a result of the employee’s own serious health condition triggers leave under the FMLA, but not the FLA. Upon returning from leave for his or her own serious health condition, the employee remains eligible for a full 12 weeks of leave for any condition covered under the FLA. N.J.A.C. 13:14-1.6. Also, employers should be cognizant of their duty to engage in the interactive process to determine whether some other sort of leave might be a reasonable accommodation under the ADA and/or the New Jersey Law Against Discrimination. Not a week goes by when we are not presented with a new employee leave related question by one of our clients.

If you have any questions about how New Jersey’s Family Leave Act could affect your organization, please contact [Scott Ohnegian](#), [Daniel Zappo](#), or any member of Riker Danzig’s [Labor & Employment Group](#).

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