



Navigating The Waters of Leaves of Absence Laws

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You have a business to run. Employees have families and themselves to support. These competing priorities led Congress to enact the Family and Medical Leave Act (FMLA) to provide certain leave entitlement and job protection for employees who need time away from their jobs. In the 13 years since its enactment, many open questions remain. Experience also shows that the FMLA, though laudable in intent, is difficult for employers to implement. To complicate matters, New Jersey employers must also comply with the New Jersey Family Leave Act (FLA). Although similar to the FMLA, the FLA is different in several

respects. This article provides a basic primer on the laws, highlights key differences between them and discusses their interplay.

The FMLA

The FMLA allows eligible employees to take up to 12 weeks of unpaid leave in a 12-month period for certain specified reasons. In the private sector, the FMLA covers employers that employ 50 or more employees in 20 or more weeks in the current or preceding calendar year. Though unpaid, an employer, in most circumstances, may require an employee to use paid leave entitlements during a leave.

Not all employees are eligible for FMLA leave. An employee must (1) have worked for the employer for a total of 12 months; (2) have worked at least 1,250 hours over the prior 12 months; and (3) work in a location with at least 50 employees within 75 miles.

An eligible employee may take leave for the birth, adoption or foster care placement of a child. Employees electing to take leave under these circumstances can do so only during the first 12 months after the birth or placement. Spouses working for the same employer may take a combined 12

weeks after the birth or placement of a child.

An employee also may take leave if he or she is unable to work because of a "serious health condition," or to take care of a child, spouse or parent with a serious health condition. Determining what constitutes a serious health condition is sometimes like solving a Rubik's cube. The FMLA vaguely defines a serious health condition as a physical or mental condition that requires either inpatient care (i.e., an overnight stay) or continuing treatment by a healthcare provider. However, not all conditions that require continuing treatment entitle an employee to FMLA leave. A serious health condition involving continuing treatment means:

- Incapacity for more than three consecutive days and subsequent treatment or incapacity, provided that it involves either (a) two or more treatments by, under the supervision of, or on referral by a healthcare provider; or (b) one treatment by a healthcare provider resulting in a regimen of continuing treatment under the provider's supervision;
- Any period of incapacity due to pregnancy or prenatal care;
- Any period of incapacity due to

a "chronic" health condition (e.g., diabetes);

- Any period of incapacity due to a long-term condition for which treatment may not be effective (e.g., Alzheimer's Disease);
- Absence for treatments for restorative surgery; or Absence for treatments to prevent further incapacity (e.g., chemotherapy).

An eligible employee's right to take FMLA leave is not without restriction. For example, employees seeking to use FMLA leave must provide 30-day advance notice, provided the need is foreseeable. Employers may require that employees provide medical certification supporting the need for leave due to a serious health condition of the employee or an immediate family member.

Perhaps the most burdensome aspect of the FMLA for employers is "intermittent" leave, which an employee may take if "medically necessary." For example, an employee suffering from migraine headaches may take leave intermittently, with no advance notice when a migraine occurs. Although such absences can disrupt an employer's schedule, the FMLA permits them.

Regardless of whether leave is paid or unpaid, an employer is required to maintain group health insurance coverage for the employee on FMLA leave if such insurance was provided before leave was taken. Most importantly, upon return from FMLA leave, an employee must be restored to the same job he or she previously held or to a position with equal pay, benefits and terms and conditions of employment.

The FLA

New Jersey employers also must comply with the FLA, which is the state law that governs family leave. Like the FMLA, the FLA allows employees to take up to 12 weeks of unpaid leave (over a 24-month period) under certain circumstances. There are, however, several differences between the FMLA and the FLA.

The most significant difference deals with the circumstances under which employees may take leave. Only under the FMLA is an employee entitled to leave to care for his or her own serious medical or health condition. The FLA does not provide for leave to tend to one's own medical condition.

The method by which the two laws calculate the number of employees also differs. An employer will be covered under the FMLA if it employs 50 employees within a 75-mile radius of that employee's work-site. However, the FLA covers employers with 50 or more employees anywhere, even if as few as one works in New Jersey.

Another major difference between the FMLA and the FLA is that while the FMLA defines a qualified employee as one who worked at least 1,250 hours during the previous 12-month period, the FLA only requires that the employee work 1,000 hours in a 12-month period. Thus, an employee in New Jersey who has worked less than 1,250 hours, but more than 1,000, will still qualify for leave under the FLA, though not the FMLA.

When 12 Weeks of Leave Becomes 24 Weeks in NJ

As discussed, both the FMLA

and FLA allow for 12 weeks of leave, so the most leave an employee can take is 12 weeks at a time, right? Wrong. Because the FLA only covers leave to care for someone other than the employee, leave taken to care for one's own serious health condition does not count against an employee's FLA leave entitlement. This concept is best illustrated by example. Under the FMLA, a pregnant employee could be entitled to 12 weeks of leave before giving birth to care for her own health condition related to pregnancy (e.g., doctor-ordered bed rest). The FLA does not trigger for such a leave. After the employee gives birth, she then would be entitled to 12 weeks of leave under the FLA to care for her newborn child, thus entitling her to a total of 24 weeks of leave in a 12-month period. Similarly, an employee who takes 12 weeks of leave early in the year for surgery still would have 12 weeks of leave later in the year to take care of an ill family member.

If all of the intricacies of the FMLA and FLA could be summarized in this small space, employers would have no worries. This outline, however, merely scratches the surface. Employers are well-served to examine their leave policies and procedures for compliance with applicable laws and to consult with counsel as appropriate. ¶

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