



Mandated Benefits

Attorneys advise caution in an employment area mired with complexity. *By George N. Saliba, Managing Editor*

There is a morass of various employment laws that businesses across the nation and in New Jersey must comply with in order to avoid employee lawsuits or government intervention, and there are few employment law subsets as confusing as state and federal family and disability leave. A recent New Jersey Business & Industry Association seminar regarding leave topics demonstrated that even some seasoned human resources professionals in attendance were initially baffled by how they should properly handle “leave” employment situations. On the following pages, *New Jersey Business* magazine explores some relevant issues Garden State businesses may wish to discuss with their attorneys.

New Jersey Paid Family Leave

This month, the New Jersey Paid Family Leave Act (NJPFLL) marks its one-year anniversary, as it continues to represent yet another component in an employment-leave maze that also encompasses the New Jersey Family Leave Act, New Jersey Temporary Disability Benefits Law, the New Jersey Workers Compensation Act, the federal Family and Medical Leave Act, the federal Americans with Disabilities Act and the New Jersey Law Against Discrimination. Employers should be aware that these laws interact in complicated ways.

With the New Jersey Paid Family Leave Act specifically, the State of New Jersey decides whether or not an employee can use it, and the state determines the time when an employee can do so. Some attorneys report that employers are not accustomed to the state making these decisions because prior to NJPFLL, employees working for companies with 50 or less employees would only have sick time, vacation time and personal time to care for a family member. With NJPFLL, employees can take up to six weeks off, and the employer may not be able to operate efficiently without those employees, especially if the firm has only a handful of workers.

A twist is that while NJPFLL provides some income to employees who need to take time off to care for a seriously ill family member or a newborn/adopted child, it is not actually a leave statute; it does not require an employer to hold an employee's job open.

Michael A. Shadiack, a partner at the law firm of Connell Foley, says an employer may have, say, a total of five employees, and if a key person is leaving for six weeks under NJPFLL, the business might decide to replace the employee on a permanent basis and not offer the absent employee his or her job back.

However, Shadiack explains, "Technically, under the New Jersey Paid Family Leave Act, the [business] can do that and



Peter Frattarelli, of Archer & Greiner, says that if his clients' employees are going to be out for four to six weeks, the employers will "typically just deal with it."



Michael Shadiack, of Connell Foley, notes, "The New Jersey Paid Family Leave law does not entitle employees to any amount of leave from work. It is merely a temporary income replacement benefit available to employees when they are absent from work due to one of the reasons covered by the statute."

it wouldn't violate public policy. But, so many employers are nervous about doing that because they really don't want to take that next step of running the risk of being a test case for a retaliation claim under this new law."

Another headache for companies is the issue of "intermittent leave" under NJPFLL: Employees in some cases do not have to take the time off in a solid block of six weeks. Intermittent leave can be particularly disruptive because an employee can request every Monday off to bring an elderly mother to doctors' appointments, but then a doctor's office visit might be canceled and moved to a Tuesday.

If An Employer Has More Than 50 Employees

Companies with 50 or more employees, again, must comply with the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act, the latter being the state's unpaid leave statute. Of course, the full host of other aforementioned laws and acts also come into play. Scott A. Ohnegian, a partner at the law firm of Riker, Danzig, Scherer, Hyland & Perretti LLP, comments on the above two acts: "Employers who use a 12-week yardstick say, 'OK, you are out for 12 weeks. If you don't come back, you are terminated.' That seems to be something you can do under the law. However, what they are missing are the Americans with Disabilities Act and the New Jersey Law Against Discrimination."

For instance, if an employee gets into a car accident and suffers a significant injury and at the end of the 12 weeks he has not returned to work – the employer might terminate him. But, the employee might first say, "Well, my doctor says I can come back three weeks from now."

Ohnegian explains, "An employer has an obligation to engage in what is called the interactive process, with someone who is disabled, to determine whether a reasonable accommodation could exist,

which would allow that person to do his or her job when they return. An extended period of time out of work, beyond 12 weeks, could be that reasonable accommodation.”

Speaking broadly, Ohnegian warns, “Understand that the benefit of every doubt is going to be resolved against you, if you are an employer.” Moreover, the larger a company is, the harder it is to show that accommodating an employee creates an “undue hardship” for the business. If a business has three employees and they are critical, and one of them says he or she needs to be out for six months, it would not be difficult for the employer to demonstrate that situation creates undue hardship. However, if a company has tens of thousands of employees and an employee has a disability that requires him to be out for more than 12 weeks, the business probably won’t be able to demonstrate that it creates an undue hardship to hire a temporary employee or alter other employees’ schedules.

Common Errors

On the other hand, Peter L. Frattarelli, a partner at the law firm of Archer & Greiner, reports that his firm has encountered a number of small businesses that offer FMLA to their employees even though the companies don’t have to. All companies must adhere to New Jersey Paid Family Leave, but employees are not automatically entitled to FMLA unless, again, a business has 50 or more employees.

Frattarelli says, “The company may have 35 employees or 20 employees, and they borrowed an [employee] handbook off the Internet. That’s the most common mistake I have seen small businesses make.”

Also, both statutes have eligibility requirements that relate to the



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number of hours worked: employees must work a certain length of time before they are entitled to them. Some employers do not track this properly.

Personnel Policies

Ohnegian, at Riker Danzig, says a sphere that employers often don’t think of as “regulated” is their own policies and practices, such as vacation policy, sick time and holidays. However, once an employer creates a policy, it in essence creates a contract between itself and its employees that must be uniformly and consistently followed. If it is not, this may generate claims by employees who believe the policies have been violated.

Ohnegian says, “For example, you may have a policy that says that at the end of every year, if employees don’t use vacation time, they lose it. But, you have a really good salesperson who you want to [treat well]. So, you say, ‘You know what, you (employee) can carry your vacation over to the next year.’ And that’s for a 32-year-old white male. The following year you have a 64-year-old African-American who just got back from serving in the National Guard. And she says, ‘I want to carry my vacation forward just like you let this other guy.’ And you say, ‘no.’ Now you’ve got a major problem. ... When employers make decisions with respect to employees, they need to not just focus on that particular issue, but how that decision impacts upon the company’s ability to face similar situations in the future.”

If In Doubt, Check It Out

John H. Schmidt, Jr. is a partner at the law firm of Lindabury, McCormick, Estabrook & Cooper, P.C. He says, “There are really four or five acts that have to be considered in all

of this (NJFLA, FMLA, etc.), in light of the employer's own personnel policies. A tip for small employers is to at least know when they might be

walking on thin ice and to recognize that if they have any question at all, if they are not absolutely confident, they probably should contact a law-

yer to help them navigate through these particular acts. And I think, quite frankly, it is not a bad idea, especially for small employers, to try to develop some type of relationship or rapport with a labor and employment lawyer.

"Small businesses may say, 'Well, I can't afford that.' And that may be true, to a point. But, it's a lot less expensive to engage in a 15-, 20- or 25-minute telephone call with a lawyer, than it is to subsequently defend some type of an administrative action that was filed by the Department of Labor, or the New Jersey Division on Civil Rights, or the EOC, or to defend a lawsuit that was filed. In my practice, I have a number of clients with whom I have a very good rapport, (particularly in) the human resources department or with the person coordinating employment issues. When they might be treading into an employment area [they are not sure about], they always call and engage in a telephone conversation to try to work it through. I can say in retrospect that many of my clients have avoided problems by doing that."

Conclusion

If there is a motif among attorneys' advice, it is that each company's situation can be unique, especially against the backdrop of complex laws that sometimes have no clear-cut legal answer. While the websites of the U.S. Department of Labor and the New Jersey Department of Labor and Workforce Development may explain the basics, the Internet is no substitute for the competent legal advice offered by various employment attorneys in the Garden State.

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