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Client Alert

A report for clients and friends of the Firm

May 2008

Governor Signs New Jersey Paid Family Leave Insurance Law

On Friday, May 2, 2008, Governor Corzine signed into law a paid family leave insurance program, which will provide up to six weeks of paid leave for employees who need time off to care for a seriously ill family member, or a newborn or newly adopted child. The paid leave will be funded through a payroll tax on employee earnings that begins on January 1, 2009, but the paid leave benefits, which will be two-thirds of pay to a current maximum of $524 per week, will not be available until July 1, 2009.

The legislation was strongly opposed by the business community, which expressed concern that this law would result in higher costs due to increased overtime, hiring of temporary help, lost productivity and additional administrative time. Opponents argued that the new law is particularly burdensome in the current economy, and will put New Jersey businesses at a competitive disadvantage and deter new businesses from coming to the state.

Under the new law, employers will have posting, notice and reporting obligations. Further, as with state-mandated disability benefits, employers may opt out of the state insurance program, by providing the same or better benefits through a private insurance plan, a union fund, or a self-insured plan, provided that any such plan is approved in advance by the New Jersey Department of Labor and Workforce Development.

A more detailed discussion of the new law's provisions and implications is contained in our April 2008 Client Alert, attached below.

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New Jersey Legislature Passes Law Providing Six Weeks Paid Leave for Employees to Care for Newborns, Newly Adopted Children or Seriously Ill Family Members

Despite strong opposition from employers, it appears that New Jersey is about to become just the third state[1] in the nation to provide paid family leave for workers to care for newborns, newly adopted children, or seriously ill family members. The law, which has passed both houses of the New Jersey legislature, is expected to be signed by Gov. Jon Corzine, who has commented favorably on it. Beginning July 1, 2009, the new law will allow up to six weeks of paid "family temporary disability leave" during any 12-month period in the form of state temporary disability insurance ("TDI") benefits for a worker to be with a child in the first 12 months after birth or the placement of the child for adoption, or to care for a family member with a serious health condition.

Benefits

The weekly benefit provided under the law is similar to the amount under TDI for the worker's own disability, which currently is one-third of wages, up to $524 per week. There is also a one-week waiting period before benefits will be paid, similar to the existing TDI framework. For leave taken consecutively with personal disability leave, the one-week waiting period would be waived. In addition, the law provides that if leave becomes payable at any time after the third week in which leave is taken, benefits will then become payable for the first week of leave.

The leave benefits will be funded by a tax on employee wages, which will begin on January 1, 2009. As noted above, though, benefits will not commence until July 1, 2009. Workers will be taxed at a rate of 0.09% in 2009, increasing to 0.12% in 2010 up to the TDI limit, which is currently set at the first $27,700 of wages. The projected yearly tax per employee is estimated to be no more than $25.00 in 2009, increasing to about $33.24 for 2010. Opponents of the legislation, however, have predicted that the cost of funding these benefits will turn out to be much higher.

Under the New Jersey law, the employer may permit or require the employee to take up to two weeks of available sick or vacation pay or "other fully-paid" leave provided by the employer before receiving benefits under the law. The employer can then reduce the paid leave period by the amount of any such fully-paid leave provided by the employer. If the employer does require the employee to use such employer-provided paid leave, then the employee must be allowed to use it during the one-week waiting period. Paid family leave under the statute is also available in certain circumstances should a covered individual who is unemployed need to take such leave.

Employer Obligations

Although employers do not have to directly pay for this leave, they do have certain notice obligations. The Commissioner of Labor will issue a notice of benefit rights, which employers must post and distribute to all employees within 30 days after issuance. The employer will also have to provide employees with a written copy of the notice as follows: (1) upon hiring any new employee after the initial notice distribution; (2) whenever an employee notifies an employer that he/she is taking time off under circumstances covered by the law; and (3) whenever such notice is requested by an employee. Similar to the federal Family and Medical Leave Act ("FMLA") and the New Jersey Family

[1] California provides six weeks of paid family leave, while a Washington state law will provide five weeks of paid family leave beginning in October 2009.

Leave Act ("NJ FLA"), this puts a burden on employers to assess and recognize those circumstances that may fall under the new law, based on the information provided by the employee regarding the need to take leave.

Further, when any employee takes family temporary disability leave, the employer will be required to submit a "printed notice" to the individual and to the Division of Temporary Disability Insurance ("the Division"), containing the name, address, Social Security number, and wage information of the employee and the name, address, and Division identification number of the employer. The notice can be made on a form to be provided by the Division and must be issued by the ninth day of the leave being taken, regardless of whether there is an unpaid waiting period or whether the employee is being paid during the leave. The wage information required may include any sick or vacation pay or other fully-paid time being provided by the employer during the leave.

Employee Eligibility for Paid Family Leave

Unlike the FMLA and the NJ FLA, which only apply to employers with 50 or more employees, there is no minimum number of employees needed for an employer to be covered by this statute. The only requirement is that the employer is covered under the unemployment compensation laws of the state, except for certain exempt government entities. Thus, even employers with fewer than 50 employees will be subject to the requirements of this new law.

Also unlike the FMLA, there is no requirement in the new law that the employee be employed with the employer for at least 12 months and have worked at least 1,250 hours (1,000 hours under the NJ FLA) in the last 12 months. Rather, the employee will be eligible for paid family leave if he or she is covered under the state unemployment compensation laws. Thus, there may be instances when employees of larger employers take paid family leave that is not covered by the FMLA or the NJ FLA because the employee has not worked enough time to qualify under those statutes. If so, the employee could then take up to 12 more weeks of family leave, albeit unpaid, once the employee worked enough hours and months to trigger leave entitlement under the FMLA or the NJ FLA.

The new law defines a "serious health condition" identically to the NJ FLA as "an illness, injury, impairment or physical or mental condition which requires: inpatient care in a hospital, hospice, or residential medical care facility; or continuing medical treatment or continuing supervision by a health care provider." The definition of "family member" includes "a child, spouse, domestic partner, civil union partner, or parent of a covered" employee, which is slightly different than the NJ FLA definition, which does not include domestic partners. A "child" is defined to include a biological, adopted, or foster child; stepchild; legal ward; or child of a civil union or domestic partner, who is younger than 19 years of age or is incapable of self-care due to mental or physical impairment. This also differs somewhat from the NJ FLA definition of a "child," which, for example, does not include the child of a domestic partner and sets a lower age limit for a non-disabled "child" as being "under 18 years of age."

Employee Leave Requests and Benefit Claims

For leave to care for a newborn or newly adopted child, the employee is required to provide the employer with 30 days notice prior to taking leave or forego two weeks of paid benefits, but there is an exception to this penalty for "unforeseeable circumstances" that prevent prior notice. For the care of a newborn or newly adopted child, the leave must also be continuous, unless the employer and employee agree to an intermittent schedule.

For the care of a sick family member, the employee must schedule the leave, "when possible," so as to minimize disruption to the employer's operations and must give fifteen days notice, "if possible," for intermittent leave. Thus, the exceptions to the rule may leave an employer with essentially no prior notice before an employee goes out on covered leave. In the case of intermittent leave, the law calls for the leave to take place within a 12-month period and the paid leave entitlement would be calculated as a maximum of 42 days. The employee is also mandated, "if possible," to provide the employer with a schedule of the workdays when intermittent leave will be taken. The law does not appear to contemplate taking paid leave in less than full day absences.

The employee must submit a notice and claim for benefits to the Division within 30 days after the leave commences. If the leave is for the care of a family member with a serious health condition, the employee would not receive more than three weeks of benefits before having to provide a certification from a health care provider supporting the need for the leave. The employee must also provide this certification to the employer unless the individual is unemployed.

Interaction with FMLA and NJ FLA Leave

The law requires employees to take this paid family leave concurrently with any leave under the FMLA or the NJ FLA. Thus, leave taken under the new law would count against NJ FLA and/or FMLA leave, to the extent the employee is eligible for such leave. For example, an eligible employee who takes ten weeks of leave to care for a seriously ill child would be entitled to paid family leave for the first six weeks under this new law, which would run concurrently with FMLA and NJ FLA leave. The remaining four weeks of leave would be FMLA and NJ FLA leave only, and no further benefits would be payable to the employee under this new law.

No Independent Reinstatement Rights for Employees

Unlike the FMLA and NJ FLA, the paid leave law does not require an employer to return the employee to the same or equivalent position at the end of the leave—on the contrary, the law states that it may *not* be "construed to grant an employee any entitlement to be restored by the employer to employment held by the employee prior to taking family temporary disability leave or any right to take action against an employer who refuses to restore the employee to employment after the leave." If the paid family leave also qualifies as FMLA or NJ FLA leave, however, the employee would retain reinstatement rights under those laws, as this new law does not affect any rights under the FMLA or NJ FLA.

Critics, though, assert that the new law will be particularly burdensome to small businesses (under 50 employees), which have not been required to allow leave under the NJ FLA or the FMLA, but who now will face disruption to their operations and the difficulty of replacing employees, either temporarily or permanently. However, as such small employers would not be covered under the FMLA or the NJ FLA, they would *not* be required to hold open an employee's job during the leave or to restore the employee to the same or equivalent position at the end of the leave. Indeed, the law expressly provides that for employers *not* covered by the NJ FLA, the refusal or failure to hold open an employee's job "shall not be a wrongful discharge in violation of a clear mandate of public policy, and the employee shall not have a cause of action against that employer, in tort, or for breach of an implied provision of the employment agreement, or under common law, for that failure or refusal."

Similar to TDI, Employers May Opt for Private Plans to Provide Benefits

As with state disability benefits, an employer can opt-out of the state paid family leave plan, if the employer provides the same or better benefits through an approved private plan, whether by self-insurance, an insurance policy, or a union welfare plan. The employer may charge for such private plans, but no more than the amount the employee would be taxed under the new law.

EDITORS' COMMENT: Given that taxes for the new program do not begin until January 1, 2009 and benefits will not be payable until July 1, 2009, employers have time to review and revise their leave policies and consider their options. For example, employers who are self-insured or have a private carrier for employee disability benefits must decide whether to add coverage for the new paid family leave to their existing policies or to participate in the state plan. On the other hand, employers who use the state disability benefits plan, but who provide some level of paid family leave already, may wish to establish a self-insured private plan just for paid family leave. Private plans, whether self-insured, through a carrier, or through a union welfare plan, must be approved by the New Jersey Department of Labor and Workforce Development. Information on the approval process can be obtained at the Department's website at: http://lwd.dol.state.nj.us/labor/tdi/employer/private/pp_emp approval.html.

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