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RULE ADOPTIONS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF EMPLOYER ACCOUNTS**

41 N.J.R. 806(a)

Adopted Amendments: N.J.A.C. 12:16-4.1 and 4.2

Adopted New Rules: N.J.A.C. 12:16-1A.1 and 4.11

Notice of Administrative Correction

Notice of Adoption

Contributions, Records and Reports; Family Leave Insurance Benefits

Take notice that public comments submitted by John J. Sarno, President of the Employers Association of New Jersey, Livingston, New Jersey, were inadvertently omitted by the Department from its notice of adoption for the above-referenced amendments and new rules, which appeared in the January 5, 2009 issue of the New Jersey Register (see 41 N.J.R. 258(a)). The following summary of the public comments and agency responses supplements the Department's January 5, 2009 published notice of adoption.

COMMENT: Mr. Sarno takes note of the statutory definition of the term "family temporary disability leave," which includes leave taken by a covered individual from work with an employer "to participate in the providing of care, as that term is defined in the Family Leave Act, N.J.S.A. 34:11B-1 et seq. (FLA), and the regulations adopted pursuant to that act (the FLA), for a family member of the individual made necessary by a serious health condition of the family member." Mr. Sarno states that absent from the family leave insurance benefits law or from the definitions contained within proposed N.J.A.C. 12:16-1A.1 is a definition for the phrase, "participate in the providing of care." Furthermore, Mr. Sarno maintains that, "neither the Family Leave Act, nor the regulations pursuant to that Act, utilize the terminology 'participate in the providing of care'; rather both simply define 'providing care.'" Mr. Sarno suggests that the Department adopt the following definition: "Participate in providing care" means actively engaged in directly providing care as a caregiver." He adds, "Since the Department of Labor and Workforce Development has adopted the definition

of 'care' verbatim from the Family Leave Act . . . the additional definition of 'participate in providing care' is necessary to avoid potential FLI claims for such activities as mowing the lawn, walking the dog, or doing home repairs camouflaged as 'care.'"

RESPONSE: The FLA uses the term "providing care," but defines neither "providing care" nor "care." N.J.A.C. 13:14, the chapter of the New Jersey Administrative Code promulgated by the Division on Civil Rights in accordance with the FLA, does not define the term "providing care," as maintained by the commenter, but rather, simply defines the term "care." As directed by P.L. 2008, c. 17, the Department is adopting the definition of "care," contained in N.J.A.C. 13:14, to be used in conjunction with the statutory definition of the term "family temporary disability leave." The distinction sought to be made by the commenter between "providing care" and "participate in providing care" is a distinction without difference. The Department has adopted precisely those definitions relative to use of the term "family temporary disability leave," which are mandated by law. The Department declines to make the changes on adoption suggested by the commenter.

COMMENT: Mr. Sarno takes issue with the Department's inclusion within the definition of the term "family temporary disability leave," of the phrase, "be with a child during the first 12 months." Mr. Sarno suggests that the Department substitute the phrase "bond with," for the term "be with." Mr. Sarno notes that the Department has included a definition for the term "bond" within the rules and suggests that substituting the phrases in the manner indicated above, would provide clarity.

RESPONSE: The Department's definition of the term "family temporary disability leave" is taken verbatim from P.L. 2008, c. 17. The term "bond" is used by the Department within its definition of the terms "family temporary disability benefits" and "family leave insurance [page=807] benefits." The phrase "be with," which is used within the former definition and the phrase "bond with," which is used within the latter definition, are intended to have the identical meaning. It is the Department's hope that this response provides sufficient clarity; however, if at a later date the Department determines that further clarification is required, the Department will take the commenter's remarks under advisement and may decide to amend the rules at a later date.

COMMENT: Mr. Sarno takes issue with the Department's definition of the term "bond" or "bonding." He states the following:

The definition of "bonding" requires "being in one another's presence." What is the required duration for this "presence?" If an employee is on family leave to bond with a new child, and during that time they leave the child with a caregiver to take a day-trip to Atlantic City, does the person collect FLI during this trip, a day that the person would otherwise be expected to report to work?

RESPONSE: It is the Department's intent by including the second sentence within the definition of the term "bond" or "bonding," to curb possible abuses of family leave insurance benefits claims; that is, the Department wishes to ensure that the benefits are used for leave to be in the presence of the child, developing a psychological and emotional attachment between the child and his or her primary caregiver or caregivers, rather than for leave which happens to coincide with the birth or adoption of a child, but which is not for the purpose of bona fide bonding with the child. The Department does not believe that any further clarification is needed and declines to make any change to the definition on adoption.

COMMENT: Mr. Sarno notes that the definition of "family leave" or "family temporary disability leave" indicates that "family leave" does not include any period of time during which a covered individual is paid temporary disability benefits pursuant to N.J.S.A. 43:21-25 et seq. (the New Jersey Temporary Disability Benefits Law), because the individual is unable to perform the duties of the individual's employment due to the individual's own disability. Mr. Sarno asks:

Is an individual eligible for FLI benefits when they have an occupational disability and they are receiving workers'

compensation benefits? What about if an individual is disabled but they are not entitled to Temporary Disability Benefits because such benefits have been exhausted? Would they be entitled to FLI benefits?

RESPONSE: The statement within the regulatory definition of the term "family leave" or "family temporary disability leave," to the effect that there shall be no duplication of FLI and TDI benefits, is taken verbatim from P.L. 2008, c. 17. With regard to workers' compensation benefits, it is the Department's belief that eligibility for FLI benefits when one has "an occupational disability and they are receiving workers' compensation benefits" is addressed by existing N.J.S.A. 43:21-30, entitled, "Nonduplication of benefits." That section of the TDI law, of which P.L. 2008, c. 17 is a part, prohibits the duplication of "benefits . . . required or paid under this act" and "benefits . . . paid or payable under any unemployment compensation or similar law, or under any disability or cash sickness benefit or similar law, of this State or of any other state or of the federal government." N.J.S.A. 43:21-30 also states in pertinent part, "Nor shall any benefits be required or paid under this act for any period with respect to which benefits, other than benefits for permanent partial or permanent total disability previously incurred, are paid or payable on account of the disability of the covered individual under any workers' compensation law, occupational disease law, or similar legislation, of this State or of any other state or the federal government." Again, P.L. 2008, c. 17, the law which establishes the FLI benefits program, amends the TDB law. Therefore, when N.J.S.A. 43:21-30 speaks of "benefits required or paid under this act," that includes FLI benefits and any prohibition against duplication of benefits contained within N.J.S.A. 43:21-30 applies equally to both TDI and ELI benefits.

COMMENT: Mr. Sarno states the following:

The Department has chosen to adopt definitions for this provision from two separate laws, the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA); the FMLA definition for "incapable of self care" 29 CFR 825.113(c) and the ADA term for "physical or mental impairment" 29 CFR 1630.2(h). While we agree with the Department's use of these two definitions, we believe it is imperative that the "physical or mental impairment" definition include the entire definition of an ADA-qualifying impairment, which would include sections (i) and (j) requiring that the physical or mental impairment "substantially limit" a major life activity.

RESPONSE: The Department has the discretion to adopt only those portions of the FMLA and/or ADA definition, which it deems useful for purposes of implementing the family leave insurance benefits law or not to adopt any part of the FMLA or ADA definitions, if it believes that the use of those definitions would be inappropriate within this particular context. The Department has chosen the approach criticized by the commenter above, which is to say, the Department has chosen to adopt the ADA definition of "physical or mental impairment" minus that portion of the definition, which refers to a substantial limitation of a major life activity. The omitted language from the ADA definition for "physical or mental impairment" concerns the ADA standard for "disability," which has never been adopted within New Jersey law or regulation. The Department does not wish through its adoption of definitions for the limited purpose of implementing P.L. 2008, c. 17, to in any way adopt or import or imply that it is adopting or importing from the Federal law or regulations the ADA concept of "disability." Rather, the Department is using certain language from the FMLA and ADA regulations which it believes would be useful for purposes of implementing P.L. 2008, c. 17. This, again, is well within the Department's discretion.

COMMENT: Mr. Sarno questions why the term "minor" is defined within N.J.A.C. 12:16-1A.1 and suggests that the Department delete its definition of that term.

RESPONSE: The Department included a definition for the term, "minor," in order to distinguish the generally accepted definition of "minor" from the newly adopted statutory definition for the term "child." It was the Department's intention that its inclusion of this definition would provide clarity; however, it may actually cause unnecessary confusion, since the term "minor" is not used elsewhere within N.J.A.C. 12:16. Consequently, on adoption, the Department will eliminate from N.J.A.C. 12:16-1A.1 the definition for the term "minor."

Full text of the corrected rule follows (deletion indicated in brackets [thus]):

SUBCHAPTER 1A. DEFINITIONS

12:16-1A.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

["Minor" means a person under the age of 18.]

...

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