

LAW AND PUBLIC SAFETY

DIVISION ON CIVIL RIGHTS

Rules Pertaining to the Family Leave Act

Proposed Readoption with Amendments: N.J.A.C. 13:14

Proposed Repeal and New Rule: N.J.A.C. 13:14-1.14

Authorized By: J. Frank Vespa-Papaleo, Esq., Director, New Jersey
Division on Civil Rights

Authority: N.J.S.A. 34:11B-16

Calendar Reference: See Summary below for explanation of exception to calendar requirement

Proposal Number: PRN 2006-304

Submit comments by January 5, 2007 to:

Gary LoCassio, Assistant Director

Division on Civil Rights

P.O. Box 089

Trenton, New Jersey 08625-0089

The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (Division), in the Department of Law and Public Safety, enforces the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 to 16. Pursuant to N.J.S.A. 52:14B-5.1c and Executive Order No. 66 (1978), the Division's rules pertaining to the Family Leave Act, N.J.A.C. 13:14, expire on February 6, 2007. The Division has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. However, the Division, pursuant to its rulemaking authority found at

N.J.S.A. 34:11B-16, proposes certain amendments to N.J.A.C. 13:14 to ensure, where appropriate, consistency with the requirements of the Federal Family and Medical Leave Act (FMLA). The Division believes that making these rules consistent with the FMLA rules promulgated by the Federal Department of Labor, where appropriate under the requirements of the NJFLA, will simplify compliance with both leave laws for employers that are covered by both laws.

The Division on Civil Rights is charged with enforcing the NJFLA, which entitles most employees in the State to a maximum of 12 weeks of family leave from employment in any 24-month period. Under the NJFLA, eligible employees may take a family leave to provide care needed because of the birth or adoption of a child, or the serious health condition of a child, parent, or spouse. Employees returning from family leave are entitled to be restored to the position held prior to the leave or to an equivalent position of like seniority, status, employment benefits, pay and other terms and conditions of employment.

On September 16, 1991, the Director of the Division promulgated rules necessary for the implementation and enforcement of the NJFLA. The rules were readopted effective September 16, 1996 and again effective August 20, 2001. The rules proposed for readoption with amendments will continue to provide principles for interpretation of the NJFLA's various provisions consistent with the Legislature's intent, and will provide continued guidance to employers and employees who have duties and rights under the NJFLA.

On the Federal level, the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§2601 et seq., allows eligible employees of a covered employer to take job-

protected, unpaid leave for up to a total of 12 weeks in any 12-month period. Under the FMLA, leave may be taken to care for a newborn child or newly adopted child, or for placement of a child with the employee for adoption or foster care, to care for a family member with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job. The U.S. Labor Department's Wage and Hour Division promulgated final rules under the FMLA, effective February 6, 1995. 29 CFR 825. Although the Division's rules predate these Federal protections, the Division's rules have been largely consistent with the Federal rules. The amendments proposed are intended to ensure greater consistency with the requirements of the FMLA, to the extent the requirements of the NJFLA are consistent with the FMLA. Nevertheless, there remain substantive provisions of the FMLA and the NJFLA that differ in several important respects and the Division's rules have provided important guidance to employers in interpreting and complying with the NJFLA, including how the protections of the NJFLA relate to the protections provided by the FMLA and other laws.

A summary of the rules proposed for reoption, proposed amendments, repeal and new rule follows.

N.J.A.C. 13:14-1.1 sets forth the purpose of the rules.

N.J.A.C. 13:14-1.2 sets forth definitions that are used in the rules. The Division is proposing to amend the definition of "base hours," which are used to determine an employee's eligibility for NJFLA to include hours an employee would have worked, but for an absence from work for a period of time due to military service. This amendment is consistent with a directive issued by the Federal Department of Labor that such hours an

employee was unable to work because of being called for military service should be considered when determining the eligibility for FMLA of a service member who returns to employment. It is also consistent with the prohibitions against discrimination for service in the Armed Forces of the United States contained in the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12. The Division proposes amending the definition of the term “care” to include the time needed to arrange for changes in care of a family member, such as for placement in a nursing facility. This aspect of the definition is consistent with FMLA regulations. See 29 CFR §825.116(b). The Division also proposes to amend the definition of the term “employer” to include the State, any political subdivision thereof, and all public offices, agencies, boards and bodies. This amendment would make the definition consistent with that contained in the NJFLA. See N.J.S.A. 34:11B-3f. The Division also proposes to amend the definition of “serious health condition” to provide further clarification of the requirement for “continuing medical treatment or continuing supervision by a health care provider.” The proposed amendment adopts the definition from the FMLA regulations. See 29 CFR §825.114.

N.J.A.C. 13:14-1.3 sets forth those employers for whom the NJFLA is applicable. The Division proposes to amend N.J.A.C. 13:14-1.3(b) to clarify that government entities that are employers are covered by the NJFLA regardless of the 50-employee requirement applicable to private businesses. This amendment is consistent with the definition of “employer” in the NJFLA and is consistent with the manner in which public employers are governed under the FMLA. See 29 U.S.C. §2611 (4)(1)(iii) and 29 CFR §825.108(d).

N.J.A.C. 13:14-1.4 sets forth the terms of taking family leave. The Division is proposing an amendment to N.J.A.C. 13:14-1.4 concerning how employers may

determine the 24-month period during which leave is available. FMLA rules provide employers with various options for determining the 12-month period in which the FMLA leave entitlement occurs, including use of a calendar year, a fixed “leave year” such as a fiscal year, a 12-month period measured back from the date any FMLA leave begins, and a “rolling” 12-month period measured backwards from the date an employee uses any FLA leave. 29 CFR §825.200(b). The Division proposes adopting similar methods, as new subsection (c), for an employer to determine the 24-month period during which NJFLA leave is available, in order that employers covered by both laws may use the same method for administering leave.

N.J.A.C. 13:14-1.5 sets forth the leave entitlement under the NJFLA. The Division proposes to amend N.J.A.C. 13:14-1.5(d)1 to provide that an employee who takes a leave in connection with a serious health condition of a family member shall provide the employer with notice of the need for leave no later than 30 days prior to the commencement of the leave. The rule currently provides for a 15-day notice period. The 30-day notice period is consistent with the notice requirements of the FMLA, 29 U.S.C. §2612(e)(2)(B), and would provide employers with sufficient time to make arrangements to cover for an employee’s absence from work. The rule would still exempt employees from the 30-day notice requirement where emergent circumstances warrant shorter notice. The Division also proposes adding new N.J.A.C. 13:14-1.5(d)4 to provide that when an employee requests leave on an intermittent or reduced leave basis, an employer may transfer the employee to an alternative position with equivalent pay and benefits during the course of the leave period, if the alternative position better accommodates recurring periods of leave than does the employee’s regular position. Proposed new

N.J.A.C. 13:14-1.5(d)4 would also provide that an employer may not transfer an employee to an alternative position in order to discourage the employee from taking leave or to otherwise work a hardship on the employee. The proposed new paragraph regarding transfer to an alternative position during intermittent or reduced leave is consistent with the rules governing the FMLA. See 29 CFR § 825.204.

N.J.A.C. 13:14-1.6 sets forth provisions regarding the manner in which NJFLA relates to other laws. This rule was adopted effective November 18, 2002 to help clarify how employers are to reconcile NJFLA with other laws. It has been the Division's experience that some confusion still exists with respect to this topic, particularly concerning the relationship between the NJFLA and FMLA related to pregnancy, childbirth and caring for a newly born child. Consequently, the Division proposes amendments upon readoption to further clarify this area.

N.J.A.C. 13:14-1.7 sets forth the requirements concerning the use of accrued paid leave while taking leave pursuant to the NJFLA.

N.J.A.C. 13:14-1.8 sets forth the prohibitions against an individual engaging in other employment while on leave pursuant to the NJFLA.

N.J.A.C. 13:14-1.9 sets forth standards for determining whether particular "key" employees may be denied leave pursuant to the NJFLA.

N.J.A.C. 13:14-1.10 sets forth the requirements for an employer to obtain a certification attesting to the need for leave under the NJFLA.

N.J.A.C. 13:14-1.11 sets forth the standards for reinstatement of an employee following a leave pursuant to the NJFLA.

N.J.A.C. 13:14-1.12 sets forth the requirements concerning multiple requests for family leave from members of the same family. The Division proposes to amend this section to add a husband and wife as an example of members of the same family, since this is the most common example implicated by this rule, and is an area where the NJFLA differs from the FMLA.

N.J.A.C. 13:14-1.13 sets forth the requirements for employers that provide multiple types of leaves of absence.

Existing N.J.A.C. 13:14-1.14 addresses the effect of leaves of absence granted by employers before the effective date of the NJFLA in 1990. Since this rule is no longer relevant, the Division proposes to repeal it. In its place, the Division proposes a new rule, which addresses notice requirements under the NJFLA. N.J.S.A. 34:11B-6 requires employers to display conspicuous notice of its employees' rights and obligations pursuant to the NJFLA, and to use other appropriate means to keep its employees informed. The Division's poster rules require employers covered by the NJFLA to display the official NJFLA poster of the Division. See N.J.A.C. 13:8-2.2. That requirement is repeated in proposed N.J.A.C.13:14-1.14(a). Proposed N.J.A.C. 13:14-1.14(b) provides that employers that maintain written guidelines to employees regarding benefits and leave rights, such as in an employee handbook, include information about entitlements under the NJFLA in the handbook or other document. Employers that do not maintain such handbooks would be required to provide written guidance to employees regarding the employee's rights and obligations under the NJFLA. The requirements proposed in N.J.A.C. 13:14-1.14 mirror those of the FMLA. See 29 CFR §§825.300 and 825.301.

N.J.A.C. 13:14-1.15 sets forth the prohibitions against retaliation against employees who seek information regarding or exercised any right under the NJFLA.

N.J.A.C. 13:14-1.16 sets forth the procedure for processing of NJFLA complaints filed with the Division.

As the Division has provided a 60-day comment period on the notice for this proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules will have a beneficial social impact upon all eligible employees in the State of New Jersey. The rules implement the stated purpose of the Legislature in promoting the economic security of families by guaranteeing jobs to employees who choose to take a leave due to the birth or adoption of a child or because of the serious health condition of a family member.

The rules also recognize the practical difficulties facing employers in providing the leave required by the NJFLA and, therefore, make provisions to protect employers from possible employee abuse. Moreover, the rules will have a beneficial social impact in that they clarify provisions of the NJFLA which may be the cause of confusion among employers and employees regarding the types and terms of leave permitted as well as eligibility requirements of the NJFLA. The proposed amendments would further assist employers by attempting, where possible, to make these rules consistent with those for implementing the FMLA. If these rules are not readopted, it would create uncertainty among employers and increase the burden on them to interpret the NJFLA and to determine their responsibilities under the NJFLA.

Economic Impact

The rules not will economically impact employers to a degree greater than they are presently impacted by the NJFLA. Moreover, the economic impact to employers will be minimal since the NJFLA and the rules only require employers to grant an unpaid leave to eligible employees. Employers may incur costs for administering leaves under the NJFLA, but such costs stem from the leave requirements of the NJFLA and not the rules proposed for readoption with amendment. The amendments proposed upon readoption should have a positive economic impact on employers covered by both the NJFLA and FMLA, since the amendments to the extent possible attempt to make the rules for compliance consistent with those under the FMLA. The proposed amendments should have a positive economic impact on employers covered by both the NJFLA and FMLA, since the amendments, to the extent possible, attempt to make the rules for compliance consistent with those under the FMLA. Additionally, the rules have no economic impact on employers with fewer than 50 employees since these small businesses are exempt from the NJFLA. The economic impact to eligible employees will be substantial in that employees will be able to attend to specific family needs without risk to their job security.

Federal Standards Statement

A Federal standards analysis is not required because the rules are intended to clarify and interpret the New Jersey Family Leave Act, and are not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. While there is substantial overlap between the FMLA and the NJFLA, the rules are designed to facilitate enforcement and compliance with the New Jersey Family Leave Act, and are not

governed or affected by the FMLA. Further, the rules are specifically intended to clarify the ways in which the NJFLA differs, substantively and procedurally, from the Federal statute. Further, wherever possible consistent with the requirements of the NJFLA, the Division has proposed amendments to make the rules consistent with those for the FMLA. A detailed explanation of the rules affected is contained in the Summary above.

Jobs Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the creation or loss of jobs in the State.

Agriculture Industry Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the agricultural industry.

Regulatory Flexibility Analysis

The rules will not impose any reporting or recordkeeping requirements on small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules apply to businesses with 50 or more employees. Therefore, some covered employers may be small businesses as that term is defined in the Regulatory Flexibility Act. These rules do not impose any reporting, recordkeeping or other compliance requirements on covered employers, or other compliance requirements beyond the compliance requirements imposed by the NJFLA itself. Any recordkeeping which may be generated by the NJFLA is minimal and should be able to be performed by an employer's current personnel or benefits officer. Employers will, however, likely find it necessary to hire temporary employees to assume the duties normally performed by the employees who are on leave. Nevertheless, because the NJFLA does not require the employer to pay the employee while on leave, it would not require the employer to pay two employees while using a temporary employee to replace an employee on family

leave. Furthermore, as indicated in the Summary above, the FMLA also provides family leave to most New Jersey employees eligible under the Act. Since the FMLA applies to employers with 50 or more employees within a 75-mile radius, most small businesses covered under the Act are also covered by the FMLA. Therefore, the rules should have a minimal effect on small businesses. The Division does not believe that professional services are required for compliance, and has attempted in the rules to provide employers with sufficient guidance such that they may be able to implement the requirements of the NJFLA without professional services.

Smart Growth Impact

The Division does not anticipate that the rules proposed for readoption with amendments will have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan, otherwise known as the State Plan.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:14.

Full text of the proposed amendments, repeal and new rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:14-1.2 Definitions

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

...

“Base Hours” means the hours or work for which an employee receives compensation. Base hours shall include overtime hours for which the employee is paid additional or overtime compensation, and hours for which the employee receives

workers' compensation benefits. **Base hours shall also include hours an employee would have worked except for having been in military service.** At the option of the employer, base hours may include hours for which the employee receives other types of compensation, such as administrative, personal leave, vacation or sick leave.

...

“Care” means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, **arranging for a change in care,** assistance with essential daily living matters and personal attendant services.

...

“Employer” means an employer as defined in the Act which employs 50 or more employees, whether employed in New Jersey or not, for each working day during each of 20 or more calendar workweeks in the then current or immediately preceding calendar year. **“Employer” includes the State, any political subdivision thereof, and all public offices, agencies, boards or bodies.**

...

"Serious health condition" means an illness, injury, impairment, or physical or mental condition which requires:

1. Inpatient care in a hospital, hospice, or residential medical care facility; or
2. Continuing medical treatment or continuing supervision by a health care

provider.

As used in this definition, “Continuing medical treatment or continuing supervision by a health care provider” means:

- 1. A period of incapacity (that is inability to work , attend school or perform regular daily activities due to a serious health condition, treatment**

therefore and recovery therefrom) of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

i. Treatment two or more times by a health care provider, or

ii. Treatment by a health care provider on one occasion which results in a regimen of continuing treatment under the supervision of a health care provider;

2. Any period of incapacity due to pregnancy, or for prenatal care;

3. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition;

4. A period of incapacity, which is permanent or long-term, due to a condition for which treatment may not be effective (such as Alzheimer's disease, a severe stroke or the terminal stages of a disease) where the individual is under continuing supervision of, but need not be receiving active treatment by, a health care provider; or

5. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity or more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy) or kidney disease (dialysis).

13:14-1.3 Applicability

(a) (No change.)

(b) [To determine whether a government entity is an employer for the purposes of granting family leave, the criteria established under (a) above shall apply.] **Employers that are government entities are deemed to be an “employer” under the Act notwithstanding the requirements of (a) above. Government entities may deny leave under the Act to those employees that are exempt pursuant to N.J.A.C. 13:14-1.9.**

13:14-1.4 Terms of leave

(a) Family leave may be taken for up to 12 weeks within any 24-month period. [The calculation of the 24 month period shall commence with the commencement of the family leave.] The leave may be paid, unpaid or a combination of paid and unpaid. The employee who requests the leave must provide the employer reasonable advance notice, the length of which will be determined by the type of leave requested, as set forth in N.J.A.C. 13:14-1.5.

(b) (No change.)

(c) In determining the 24-month period in which the 12 weeks of leave shall be granted under the Act, an employer may choose from any of the following methods:

1. The calendar year;

2. Any fixed “leave year,” such as a fiscal year or a year starting on an employee’s “anniversary date”;

3. The 24-month period measured forward from the date any employee's first leave under the Act begins; or

4. A "rolling" 24-month period measured backward from the date an employee uses any leave under the Act.

(d) An employer may choose any method of determining the 24-month period listed in (c) above, provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements. If an employer fails to select one of the options listed in (c) above for measuring the 24-month period, the option that provides the most beneficial outcome for the employee will be used.

13:14-1.5 Leave entitlements

(a) – (c) (No change.)

(d) An employee whose family member (as defined by the Act) has a serious health condition is entitled to up to 12 weeks of family leave taken on a consecutive, reduced leave or when medically necessary, intermittent basis. The care that an employee provides need not be exclusive and may be given in conjunction with any other care provided. When requesting family leave on an intermittent basis or reduced leave schedule, the employee shall make a reasonable effort to schedule such leave so as not to unduly disrupt the operations of the employer.

1. An employee who takes a leave in connection with the serious health condition of a family member shall provide the employer with notice, no later than [15] **30** days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.

2. - 3. (No change.)

4. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on care of or planned medical treatment for a family member, or if an employer agrees to permit an employee intermittent or reduced schedule leave for the birth of a child or placement of a child for adoption, the employer may require the employee during the period of leave to temporarily transfer to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. The alternative position must have equivalent pay and benefits to the employee's regular position. An employer may not transfer an employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position is able to return to full-time work, he or she must be placed in the same or equivalent job as the one he or she left when the leave commenced.

(e) – (f) (No change.)

13:14-1.6 Relation with other laws

(a) (No change.)

(b) Medical or disability leave granted under other laws, but not granted under the Act, shall not abridge an employee's right to leave or other protections granted under the Act. For example, the FMLA provides leave for an employee's own disability, but disability leaves are not covered by the Act. Some situations which may arise under this example include, but are not limited to:

1. If an employee first takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, the employee would be entitled to an additional 12 weeks of leave within 24 months under the Act to care for a seriously ill family member or newly born or adopted child, because the prior disability leave was taken for a purpose not covered by the Act. **Under this example, if an eligible employee is on disability leave while pregnant for four weeks and is on disability leave following childbirth for an addition six weeks, those 10 weeks that the employee is on disability leave count against the employee's FMLA entitlement only, and the employee retains the full 12-week entitlement under the Act for the care of the newly-born child ;**

2. (No change.)

(c) (No change.)

13:14-1.12 Multiple requests for family leave

An employer shall grant a family leave to more than one employee from the same family (for example, **a husband and a wife, or a** brother and a sister) at the same time, provided such employees are otherwise eligible for the leave.

[13:14-1.14 Retroactivity]

Any leave of absence granted to an employee prior to the effective date of the Act shall not be considered a family leave for purposes of determining an employee's entitlement to a family leave under the Act, with the following exception: any period of leave taken by an employee within one year prior to the employee's eligibility for family leave, for the purpose of providing care made necessary because of the birth or placement for adoption of a child, shall be considered as part of the employee's family leave entitlement under the Act, if such leave maintained the same benefits and preserved the same rights as are required by the Act.]

13:14-1.14 Notice to employees

(a) Employers covered under the Act shall display the official Family Leave Act poster of the Division on Civil Rights in accordance with N.J.A.C. 13:8-2.2.

(b) If an employer covered under the Act maintains written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave under the Act and employee obligations under the Act must be included in the handbook or other document. If an employer does not have written policies, manuals or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the Act.