New Jersey Significantly Expands Employee Entitlements with Respect to Leaves of Absence and Wage Replacement Benefits

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Several New Jersey laws relating to leaves of absence and wage replacement benefits for periods of disability or family leaves were amended in February 2019. This article summarizes the major changes made by Public Law 2019, Chapter 37\(^1\) to the:

- New Jersey Family Leave Act (NJFLA).
- New Jersey Temporary Disability Insurance Benefit Law (NJTDIBL).
- New Jersey Family Leave Insurance Benefit Law (NJFLIBL).

Of particular importance to New Jersey employers are two significant changes to the NJFLA, which currently applies to employers with 50 or more employees:

- As of February 19, 2019, the NJFLA now allows eligible employees to take job-protected unpaid leaves in a significantly expanded number of situations. This could potentially and dramatically increase leave-stacking opportunities for employees of employers with 50 or more employees who are eligible for leave under both the NJFLA and the federal Family and Medical Leave Act (FMLA).\(^2\)

- As of June 30, 2019, the NJFLA will apply to employers with 30 or more employees. The FMLA will still apply only to employers with 50 or more employees.\(^3\)

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\(^1\) The text of Public Law 2019, Chapter 37 is available at [https://www.njleg.state.nj.us/2018/Bills/AL19/37_.PDF](https://www.njleg.state.nj.us/2018/Bills/AL19/37_.PDF).

\(^2\) Leave stacking is discussed later in this article.

\(^3\) See 29 C.F.R. §825.104 (“Covered employer”), at [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=d5&view=text&node=29:3.1.1.3.54&idno=29](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=d5&view=text&node=29:3.1.1.3.54&idno=29).
Some of the changes made by the new law went into effect on February 19, 2019, while others have delayed effective dates.

As used in this article, underscored words in quotes are words that were added to the applicable law by the amendments, whereas words that are crossed out are words that were deleted from the applicable law by the amendments.

Amendments to the New Jersey Family Leave Act (NJFLA)

The NJFLA currently requires employers with 50 or more employees (whether located in New Jersey or elsewhere) to provide eligible New Jersey employees up to 12 weeks of job-protected unpaid leave in a 24-month period for the birth or adoption of a child or the serious health condition of a child, parent, civil union partner, or spouse.

To be eligible for family leave under the NJFLA, an employee must be employed in New Jersey by a covered employer, must have been employed by the employer for at least 12 months, and must have worked at least 1,000 base hours during the immediately preceding 12-month period.

Pursuant to regulation issued by the New Jersey Division on Civil Rights (NJDCR), employees are required to give employers at least 30 days' advance notice of the need for leave that is foreseeable.

Employers should expect the NJDCR to issue revised NJFLA regulations, posters, and fact sheets to reflect the changes discussed in this article.

As a result of the 2019 amendments, effective as of February 19, 2019:

- The definition of "child" now includes “a biological, adopted, foster child, or resource family child, stepchild, legal ward, or child of a parent, who is (1) under 18 years of age; or (2) 18 years of age or older but incapable of self-care because of a mental or physical impairment including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier.” As a result of the amendments, a “child” is no longer limited to a child who is either (a) under the age of 18 or (b) age 18 and older and has a disability.

  In its regulations, the NJDCR had already given the term “child” an expansive reading, to include a foster child and a child with respect to whom an employee “has sole or joint legal or physical custody, care, guardianship, or visitation.”
Note that the federal FMLA has a very limited definition of who qualifies as a “son” or “daughter.”

- The definition of "parent" now includes “a person who is the biological parent, adoptive parent, foster parent, resource family parent, step-parent, parent-in-law or legal guardian, having a 'parent-child relationship' with a child as defined by law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or who became the parent of the child pursuant to a valid written agreement between the parent and a gestational carrier.”

- The definition of "family member" now includes “a child, parent, parent-in-law, sibling, grandparent, grandchild, spouse, domestic partner, or one partner in a civil union couple, or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.”

- The reasons for which “family leave” might be taken now include:

  “(1) the birth of a child of the employee, including a child born pursuant to a valid written agreement between the employee and a gestational carrier;  

  (2) the placement of a child into foster care with the employee or in connection with adoption of such child by the employee; or  

  (3) the serious health condition of a family member of the employee.”

- The amount of advance notice of the need for NJFLA-covered leaves that an employee must give an employer has been changed to track the notice requirements of the NJFLIBL, which provides that:

  o In the case of non-intermittent leaves involving a serious health condition, the employee must provide the employer reasonable advance notice. For intermittent leaves, the employee must give the employer at least 15 days’ advance notice.  

  o In the case of non-intermittent leaves with respect to a birth, placement in foster care, or adoption of a child (i.e., “bonding” leaves), the employee must provide the employer with at least 30 days’ advance notice. For intermittent leaves, the employee must give the employer at least 15 days' advance notice.

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4 See 29 C.F.R. §825.102 (“Definitions”), at https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29.
In the case of leaves to engage in activities for which unpaid leave may be taken pursuant to the NJ SAFE Act, the employee must provide the employer reasonable advance written notice. In situations where the need for leave is a qualifying event under both the NJ SAFE Act and the NJFLA, the employer should require no more notice than required under the law that requires the least notice.

The foregoing notice requirements are subject to being relaxed in the event of unforeseen or emergency circumstances.

Employees are now entitled to take bonding leaves on an intermittent basis without first obtaining their employer's approval.

Note that employer approval is still required under the federal FMLA with respect to intermittent bonding leaves. To avoid the stacking of leave periods under both the NJFLA and the FMLA, an employer with 50 or more employees should now consider always approving eligible New Jersey employees’ requests for intermittent bonding leave when the intermittent leave would be covered under both laws.

It is unclear whether the 2019 amendments eliminated the reduced leave schedule option under the NJFLA for bonding leaves.

If it has been eliminated, then employees still have the option to take bonding leaves on an intermittent basis.

If it has not been eliminated, then employees no longer need their employer’s approval to take bonding leaves on a reduced leave schedule. Employees will still have the option to take bonding leaves on an intermittent basis.

Hopefully the NJDCR will issue regulations that will bring clarity to whether the reduced leave schedule option with respect to bonding leaves has been eliminated under the NJFLA.

Note that the reduced leave schedule option is still available under the FMLA, with the employer’s approval, with respect to bonding leaves. If the reduced leave schedule option with respect to bonding leaves has not been eliminated under the NJFLA, then an employer with 50 or more employees should now consider always approving New Jersey employees’ requests for a reduced leave schedule for bonding leaves when the leaves would be covered under both laws.

Prior to the amendments, an employee was not entitled to a reduced leave schedule for a period exceeding 24 consecutive weeks.
As a result of the amendments, an employee is now not entitled to a reduced leave schedule for a period exceeding 12 consecutive months for any one period of leave.

- The NJDCR’s regulations require that intermittent leave be taken in periods of at least one workweek. This requirement is not expressly required by the language of the NJFLA. In view of the amendments to the NJFLIBL (discussed below), which now permit intermittent leave on a daily basis for all of the different types of the NJFLIBL-covered leaves, it is possible that the NJDCR, when revising its NJFLA regulations to conform to the 2019 amendments, will reconsider this requirement.

As a result of the 2019 amendments, **effective as of June 30, 2019:**

- As explained above, the NJFLA currently applies to employers with 50 or more employees (whether located in New Jersey or elsewhere). As of June 30, 2019, the NJFLA will apply to employers who employ 30 or more employees (whether located in New Jersey or elsewhere) for each working day during each of 20 or more calendar workweeks in the then current or immediately preceding calendar year.

**Increased Opportunities for Stacking Leaves**

For employers with 50 or more employees, one of the most significant effects of the 2019 amendments to the NJFLA could be the significantly increased number of

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5 The 2019 law that is the subject of this article went through several revisions before being approved, resulting in some drafting errors. One such error relates to the effective date of the change discussed in this bullet. It is likely that the legislature meant for this change to go into effect on July 1, 2019, not June 30, 2019. Nonetheless, the final text says June 30, 2019.

6 Under the federal FMLA, which applies to employers with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, the U.S. Department of Labor's regulations provide that “[a]ny employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week.” 29 C.F.R. §825.105 (“Counting employees for determining coverage”), at [https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29). However, the same regulation provides that “[i]f there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted” and that “[a]n employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.”

The NJDCR regulations do not address this issue.
opportunities for employees to stack job-protected unpaid leaves under the NJFLA and the federal FMLA. Prior to the amendments, stacking was most prevalent in two situations:

- **Pregnancy and the Birth of a Child:** If a female employee who qualifies for job-protected unpaid leave under both the NJFLA and the FMLA takes a leave for a pregnancy, the time the employee is out for medical reasons counts against the employee’s leave entitlement under only the FMLA. This is because the NJFLA does not apply to an employee’s own serious health condition.⁷

The New Jersey Department of Labor and Workforce Development (NJDLWD) has a rebuttable presumption for purposes of temporary disability insurance benefits that, absent complications, a woman will be disabled for four weeks before and six weeks after delivery.⁸ Using that presumption here, the first 10 weeks of the employee’s leave of absence reduce the employee’s job-protected FMLA leave from 12 to two weeks.

If the employee elects to stay home to bond with the newborn child, the employee is entitled to take off up to an additional 12 weeks under the NJFLA. Thus, the employee could stay out on leave for a total of 22 weeks.

- **Leave in Connection with a Family Member Who Is a Covered Family Member Under the NJFLA But Not the FMLA:** If an employee who qualifies for job-protected unpaid leave under both the NJFLA and the FMLA needs to take time off to care for a civil union partner with a serious health condition, the time off will reduce the employee’s 12-week leave entitlement under just the NJFLA because the FMLA doesn’t come into play with respect to civil union partners.

The employee would still have a full 12 weeks of job-protected FMLA leave available, which the employee could use for any of the leave purposes permitted under the FMLA.⁹

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⁸ Pursuant to Public Law 2018, Chapter 122, which is at https://www.njleg.state.nj.us/2018/Bills/PL18/122_.PDF, the NJDLWD’s 10-week presumption will become mandatory as of October 4, 2019. See N.J.S.A. 43:21-39.5(b) (“A covered individual who is approved for temporary disability benefits for disability resulting from pregnancy shall be entitled to four weeks of benefits before the expected delivery date and six weeks of benefits after the actual delivery date. *** A covered individual shall receive a longer period of disability before the expected delivery date or after the actual delivery date, if the covered individual provides the plan administering the benefits with a certification from a health care provider that the longer period is necessary.”).

⁹ See 29 C.F.R. §825.112 (“Qualifying reasons for [FMLA] leave, general rule”), at https://www.ecfr.gov/cgi-bin/text-
The NJFLA, as recently amended, now allows eligible New Jersey employees to take job-protected unpaid leaves with respect to a broad range of individuals for whom job-protected unpaid leave is not available under the FMLA, including children age 18 and older who are not incapable of self-care because of a disability, parents-in-law, siblings, grandparents, grandchildren,10 domestic and civil union partners, any other individuals related by blood to the employees, and any other individuals the employees show to have a close association with the employees that is the equivalent of a family relationship. The permutations of leave-stacking opportunities under the NJFLA are now limitless.

Amendments to the New Jersey Security and Financial Empowerment Act (NJ SAFE Act)

The NJ SAFE Act requires employers with 25 or more employees (whether located in New Jersey or elsewhere) to provide eligible New Jersey employees up to 20 days of job-protected unpaid leave during a 12-month period when the employees or certain family members of the employees have been victimized by “an incident of domestic violence” or “a sexually violent offense.” See Pro Bono Partnership’s article, New Jersey Adopts NJ SAFE Act That Requires Unpaid Leave for Victims of Domestic or Sexual Violence, for more information.

To be eligible for leave under the NJ SAFE Act, an employee must be employed in New Jersey by a covered employer, must have been employed by the employer for at least 12 months, and must have worked at least 1,000 base hours during the immediately preceding 12-month period.

The U.S. Department of Labor’s FMLA regulations provide:

If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a “spouse equivalent,” and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or “spouse equivalent.”


10 The FMLA might apply to a grandparent or grandchild in situations involving an in loco parentis relationship. See the FMLA’s definitions of “parent” and “son or daughter” in 29 C.F.R. §825.102 (“Definitions”), at https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29.
Employers should expect the NJDLWD to issue a revised NJ SAFE Act poster to reflect the changes discussed in this article.

As a result of the 2019 amendments, **effective as of February 19, 2019:**

- The scope of covered family members has been expanded to include “parent-in-law, sibling, grandparent, grandchild, child, parent, spouse, domestic partner, or civil union partner, or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.”

- An eligible employee can elect, though an employer can no longer require the employee, to use (1) the employee’s accrued paid vacation leave, personal leave, or medical or sick leave or (2) the family leave insurance benefits that the employee is entitled to under the NJFLIBL. If the employee elects to use accrued paid leave or family leave insurance benefits, then that leave or those benefits will run concurrently with the otherwise unpaid leave provided under the NJ SAFE Act.\(^{11}\)

- Where the need for leave under the NJ SAFE Act is foreseeable, an employee must provide written notice to the employer of the need as far in advance as is reasonable and practical under the circumstances, “unless an emergency or other unforeseen circumstances precludes prior notice.”

**Amendments to the New Jersey Temporary Disability Insurance Benefit Law (NJTDIBL) and Family Leave Insurance Benefit Law (NJFLIBL)**

The NJTDIBL was enacted in 1948. It was amended in 2008 by the NJFLIBL. The 2019 amendments extensively revised both laws.

Prior to the amendments, the NJFLIBL:

- Provided a wage replacement benefit to an employee for up to six weeks or 42 days to (1) care for an immediate family member who has a serious health condition; (2) bond with a newborn biological child of either the employee or the employee’s domestic partner, civil union partner, or spouse during the first 12 months after the child’s birth; or (3) bond with an adopted child during the first 12 months after the child’s placement with the employee.\(^{12}\)

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\(^{11}\) Both prior to and after the 2019 amendments, where the need for leave is a qualifying event under the NJ SAFE Act, the FMLA, and/or the NJFLA, an employer is required by the NJ SAFE Act to count the leave under each of the applicable laws concurrently.

\(^{12}\) Both prior to and after the 2019 amendments, the NJFLIBL is not applicable to an employee’s own serious health condition. An employee’s entitlement to wage replacement benefits during
• Limited an employee to no more than six weeks or 42 days during either a 12-month period or during any one period of NJFLIBL-covered leave.

• Allowed care for a family member with a serious health condition to be taken for six consecutive weeks, six intermittent weeks, or 42 intermittent days.

• Required bonding leave to be taken for a single continuous period of seven days or more, unless the employer agreed to non-consecutive periods of seven days or more.

The NJTDIBL and NJFLIBL are administered by the NJDLWD. Employers should expect the NJDLWD to issue revised guidance materials for employees and employers, revised claim forms, revised regulations, a revised Family Leave Insurance poster, and possibly a revised Unemployment & Disability Insurance poster, to reflect the changes discussed in this article.

As a result of the 2019 amendments, effective as of February 19, 2019:

• The definition of "child" now includes “a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of the covered individual, or child of a civil union partner of the covered individual, who is less than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier.” As a result of the amendments, a “child” is no longer limited to a child who is either (a) under the age of 18 or (b) age 18 and older and has a disability.

• The definition of "parent" now includes “a biological parent, foster parent, adoptive parent, or stepparent of the covered individual or a person who was a legal guardian of the covered individual when the covered individual was a child, or who became the parent of the covered individual pursuant to a valid written agreement between the parent and a gestational carrier.”

• The definition of "family member" now includes “a sibling, grandparent, grandchild, child, spouse, domestic partner, civil union partner, parent-in-law, or parent of a covered individual, or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.”

leaves for an employee’s own serious health condition is governed by the NJTDIBL in the case of an illness or injury not related to work or the New Jersey Workers’ Compensation Law in the case of an illness or injury related to work.
• Family leave insurance (FLI) benefits are now available to an employee who takes a leave to bond with a child who has been placed with the employee for foster care.

• FLI benefits are now available to an employee who engages in activities for which unpaid leave may be taken pursuant to the NJ SAFE Act (1) on the employee’s own behalf if the employee is a victim of an incident of domestic violence or a sexually violent offense or (2) to assist a family member of the employee who has been a victim of an incident of domestic violence or a sexually violent offense.

Where the need for unpaid NJ SAFE Act-covered leave is foreseeable, the employee must give the employer written notice of the need for the leave “as far in advance as is reasonable and practical under the circumstances.”

Any time off taken by an employee who is a victim of an incident of domestic violence or a sexually violent offense for which the employee receives benefits for a disability caused by the violence or offense will be regarded as a period of disability for temporary disability insurance (TDI) benefits and not as a period of leave for FLI benefits.

• When the NJFLIBL was enacted in 2008, it contained language stating that the legislature did not intend that the new law be construed as granting employees (1) a new entitlement to be restored to employment after taking NJFLIBL-covered leaves or (2) a new right to sue employers that fail or refuse to restore employees to employment after such leaves. The legislature made it clear that the new law did not supersede an employee’s right to reinstatement pursuant to the requirements of the NJFLA.

The 2019 amendments retained the foregoing language. However, the 2019 amendments added a new provision that states that employers are not permitted to discharge, harass, threaten, or otherwise discriminate or retaliate against employees because the employees requested or received TDI benefits or FLI benefits, including retaliation by refusing to restore employees following a period of leave.13 In addition, employees now have the right to sue employers for engaging in the foregoing prohibited conduct.

13 When the legislation that ultimately became the 2019 amendments was introduced, two committees in the New Jersey Assembly and two committees in the New Jersey Senate issued statements that explained the rationale for the changes to the various laws discussed in this article. All four statements asserted “that not reinstating an employee after a period of FLI benefits is not to be regarded as retaliation in the case of an employer who is exempt from the [NJFLA] because the employer has less than 30 employees.” The small employer exception already was a part of the NJFLIBL when it was enacted in 2008.
As a result of the amendments, an employer now clearly needs to be sure that an employee’s request for and/or receiving TDI benefits or FLI benefits is not used as a basis for not restoring the employee to employment. If an employee is not restored, the employer will need to be able to show that the employer had a legitimate, nondiscriminatory reason for its action, such as a reduction in force.

- Employees are not permitted to receive TDI benefits or FLI benefits for any period during which they receive from their employer any paid sick leave, vacation time, or other leave at full pay.

This new restriction is consistent with an existing requirement that employees are not permitted to receive TDI benefits or FLI benefits in a weekly amount which together with any remuneration the employees continue to receive from their employer would exceed their regular weekly wages immediately prior to the disability or leave.\(^{14}\)

- Prior to the amendments, employers could allow or require employees applying for FLI benefits to use accrued paid time off (PTO) at full pay before FLI benefits would kick in. Employers could force employees to use no more than two weeks of PTO. In addition, employers could have the total number of days of FLI benefits reduced by the number of PTO days paid to employees.

As a result of the amendments, employers can no longer (1) require employees to use PTO before collecting FLI benefits or (2) have the total number of days of benefits under the NJFLIBL reduced by the number of PTO days paid to employees.

- Prior to the amendments, NJFLIBL-covered bonding leaves had to be taken for a single continuous period, unless the employer agreed to non-consecutive periods of seven days or more. In addition, where the need for bonding leave was

\(^{14}\) This provision allows employers and employees to agree to let employees supplement their TDI benefits or FLI benefits with the employees’ accrued paid time off in order to bring their total compensation back up to their regular weekly wages immediately prior to their period of disability or leave. See NJDLWD, Employers’ Frequently Asked Questions, at https://myleavebenefits.nj.gov/labor/myleavebenefits/help/faq/emp.shtml (“Why do you need to know about the paid time off? Under the Law, benefits combined with paid time off cannot total more than your employee would earn working. We compare your employee’s paid time off with his or her regular weekly wage to calculate the amount of lost wages each week, and we pay your employee the difference, up to the maximum weekly benefit rate.”); 29 C.F.R. §825.207(d)-(e) (“Substitution of paid leave”), at https://www.ecfr.gov/cgi-bin/textidx?c=ecfr&sid=d178a2522c85f1f401ed3f3740984fed&rgn=div5&view=text&node=29:3.1.1.3.54&idno=29 (“employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits [or workers’ compensation benefits], such as in the case where a [disability] plan [or workers’ compensation] only provides replacement income for two-thirds of an employee’s salary”).
foreseeable, an employee was required to give the employer at least 30 days’ advance notice of the need for the leave.

As a result of the amendments:

- An employee is permitted to take bonding leaves for a single continuous period, for non-consecutive periods of seven days or more, or on intermittent days. An employer can no longer block the use of intermittent leave.

- Where the need for bonding leaves is foreseeable, an employee is still required to give the employer at least 30 days' advance notice of the need for leave for a single continuous period. However, only 15 days’ advance notice is required if the leave is foreseeable and will be taken on an intermittent basis.

The amendments did not change the notice requirements for foreseeable leaves involving a serious health condition. For leaves for a single continuous period, an employee must give the employer reasonable advance notice of the need for leave. For leaves taken on an intermittent basis, an employee must give the employer at least 15 days’ advance notice.

- Prior to the amendments, an employee could not collect TDI benefits for any period during which the employee performed any work for remuneration or profit.

As a result of the amendments, if permitted by the employer, the employee can now return to work on a reduced basis while recovering from the disability and potentially still collect a partial weekly TDI benefit. There are certain restrictions:

- The employee must have been totally unable to perform the duties of employment due to disability and receiving full benefits for at least seven consecutive days prior to claiming partial benefits.

- The weekly TDI benefit amount the employee would have been paid if totally unable to perform the duties of employment due to disability will be reduced by the weekly wages the employee earns.

- The maximum duration of partial TDI benefits is eight weeks, unless the NJDLWD, after a review of medical documentation from a qualified healthcare provider,\(^\text{15}\) approves in writing an extension of up to four more weeks.

\(^\text{15}\) A “qualified healthcare provider” is “a legally licensed physician, dentist, podiatrist, chiropractor, certified nurse midwife, advanced practice nurse, or public health nurse designated by the” NJDLWD.
As a result of the 2019 amendments, **effective July 1, 2019**:

- The NJDLWD will be obligated to spend at least $1.2 million each fiscal year (July 1 to June 30) to disseminate information about the rights and responsibilities of employers and employees with respect to TDI benefits and FLI benefits.

As a result of the 2019 amendments, **for periods of family leaves commencing on or after July 1, 2019**:

- Currently, payment of FLI benefits do not commence until the first day of the second week of a NJFLIBL-covered leave period. Once benefits are paid on any day after the first three weeks of the leave period, retroactive payment is made with respect to any leave taken during the first week period.

  As a result of the amendments, the one week “elimination” or waiting period will be eliminated.

As a result of the 2019 amendments, **for periods of both disability and family leaves commencing on or after October 4, 2019**:

- Currently, employers are required to give employees the NJDLWD-issued claim form for TDI benefits (Form DS-1) or FLI benefits (Form FL-1), with the employer portion of the form completed, by no later than the ninth day of the period of disability or NJFLIBL-covered family leave.\(^{16}\)

\(^{16}\) Hardcopy versions of Form DS-1 and Form FL-1 are available for download at [https://myleavebenefits.nj.gov/labor/myleavebenefits/worker/application](https://myleavebenefits.nj.gov/labor/myleavebenefits/worker/application).

The NJDLWD prefers that claims be filed electronically. See:

- For FLI benefits:
  - Information for employers: [https://myleavebenefits.nj.gov/labor/myleavebenefits/employer](https://myleavebenefits.nj.gov/labor/myleavebenefits/employer).

- For TDI benefits:
In addition, employers currently are required to:

- conspicuously post notices about both benefit programs: the Family Leave Insurance Notice (FLI notice) and the Unemployment & Disability Insurance Notice (TDI notice).\(^{17}\)

- provide employees a copy of the FLI notice at the time of hire, whenever employees notify the employers that they need time off for circumstances covered by the NJFLIBL, and the first time employees request a copy.

As a result of the 2019 amendments and an earlier set of amendments made in 2018\(^{18}\) that were not to be effective until October 4, 2019, employers will have an affirmative obligation to give a copy of the applicable claim form, with the employer portion of the form completed, to employees by no later than the ninth day (1) of the period of disability or NJFLIBL-covered family leave or (2) after the employees notify the employers of an anticipated period of disability or NJFLIBL-covered family leave, whichever comes first.

Employers that fail to provide employees required forms and notices or fail to provide the NJDLWD required information will be liable to the NJDLWD for a fine of $250 per violation.

- A second set of amendments\(^{19}\) that were enacted in 2018 but don’t go into effect until October 4, 2019 impacts the rules pertaining to TDI benefits and FLI benefits in the context of leaves for pregnancies and bonding with newborn children. Currently, the NJDLWD:

  - has a rebuttable presumption for purposes of TDI benefits that, absent complications, a pregnant woman will be disabled due to the pregnancy for four weeks before and six weeks after delivery.

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\(^{17}\) The required notices are available at [https://nj.gov/labor/lwdhome/content/employerpacketforms.html](https://nj.gov/labor/lwdhome/content/employerpacketforms.html).

\(^{18}\) This set of 2018 amendments, commonly referred to as Public Law 2018, Chapter 128, is available at [https://www.njleg.state.nj.us/2018/Bills/AL18/128_.PDF](https://www.njleg.state.nj.us/2018/Bills/AL18/128_.PDF). The effective date of these 2018 amendments, as modified by the 2019 amendments, is October 4, 2019.

\(^{19}\) This set of 2018 amendments, commonly referred to as Public Law 2018, Chapter 122, is available at [https://www.njleg.state.nj.us/2018/Bills/PL18/122_.PDF](https://www.njleg.state.nj.us/2018/Bills/PL18/122_.PDF). The effective date of these 2018 amendments is October 4, 2019.
Requires a mother who wants to take a bonding leave after recovering from a pregnancy to complete a second claim form (FL-2) in order to collect FLI benefits.

As a result of the second set of 2018 amendments:

- A woman who is approved for TDI benefits in connection with a pregnancy-related disability (1) will be entitled TDI benefits for four weeks before the expected delivery date and six after the actual delivery date; (2) will be entitled to a longer period of disability before the expected delivery date or after the actual delivery date if a health care provider certifies that the longer period is necessary; and (3) will be required to recertify for TDI benefits by no later than two weeks following the actual delivery date and cannot be required to recertify at any other time.\(^{20}\)

- An application for TDI benefits for a disability resulting from pregnancy or the birth of a child will automatically be processed an application for FLI benefits as well, unless the woman affirmatively opts out of receiving FLI benefits. The woman will be required to notify the NJDLWD (or private plan administrator) of the date on which the woman will return to work and if the woman returns to work on an earlier date.\(^{21}\)

- As a result of the changes made by the two sets of 2018 amendments and the 2019 amendments, the NJDLWD will need to issue revised versions of Form DS-1, Form FL-1, the FLI notice, and possibly the TDI notice.\(^{22}\)

As a result of the 2019 amendments, **effective as of January 1, 2020:**

- In New Jersey, both employers and employees contribute toward funding TDI benefits and unemployment compensation benefits. In contrast, employees alone contribute toward funding FLI benefits.

  Currently, the maximum amounts employers and employees must contribute are based in part on 28 times the New Jersey statewide average weekly remuneration paid to workers two years earlier, as determined by the NJDLWD. For 2019, the maximum annual wages for purposes of calculating the

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\(^{22}\) When updated, the required claim forms will be available at [https://myleavebenefits.nj.gov/labor/myleavebenefits/worker/application](https://myleavebenefits.nj.gov/labor/myleavebenefits/worker/application) and the required notices will be available at [https://nj.gov/labor/lwdhome/content/employerpacketforms.html](https://nj.gov/labor/lwdhome/content/employerpacketforms.html).
contributions is $34,400, based on the 2017 statewide average weekly wage of $1228.25.\(^{23}\)

As a result of the amendments, for 2020 and thereafter, the maximum amounts employees must contribute toward funding TDI benefits and FLI benefits will be based on 107 times the statewide average weekly remuneration paid to workers two years earlier, as determined by the NJDLWD. This change will not apply to employer contributions to fund TDI benefits.

As a result of the increase in the multiplier from 28 to 107, higher income employees will progressively contribute more to fund both benefits. Had this change gone into effect for 2019, employee contributions to fund both benefits would have stopped only after an employee earned wages greater than $131,500 in 2019.

The 28-times and 107-times cutoffs for 2020 and the potentially higher contribution rates to be applied to employee wages will be announced by the NJDLWD on or before September 1, 2019 and will be posted at https://nj.gov/labor/ea/rates/rateindex.html.

As a result of the 2019 amendments, for periods of family leaves commencing on or after July 1, 2020:

- Currently, FLI benefits are payable for up to six weeks or 42 days.

  As a result of the amendments, the benefits will be payable for up to 12 weeks or 56 days.\(^{24}\) An employee will not be entitled to more than 12 weeks or 56 days during either a 12-month period or any one period of NJFLIBL-covered leave.

- Currently, an employee cannot collect FLI benefits for any period during which the employee performed any work for remuneration or profit.

\(^{23}\) See NJDLWD, EMPLOYER HANDBOOK TO NEW JERSEY’S UNEMPLOYMENT & DISABILITY INSURANCE PROGRAMS, Chapter 1, Section 4 (Contribution Reports), at https://nj.gov/labor/handbook/chap1/chap1sec4ContributionReports.html#6. The New Jersey statewide average weekly remuneration amounts for the years 1995 to 2017 are set forth at the NJDLWD’s Workers’ Compensation Rates & Statistics web page at https://www.nj.gov/labor/wc/content/stats.html.

The 2017 statewide average weekly remuneration was used to calculate the 2019 maximum annual wage that is subject to the assessment for unemployment compensation, TDI benefits, and FLI benefits. The maximum annual wages for the most recent years are set forth at https://nj.gov/labor/handbook/chap1/chap1sec4ContributionReports.html#6 and https://nj.gov/labor/ea/rates/rateindex.html.

\(^{24}\) Note that the number of days will not increase from 42 to 84. Intermittent leave will be capped at 56 days.
As a result of the amendments, if an employee has more than one employer, the employee will have the option of claiming FLI benefits for leave taken from one employer, based on wages paid by that employer. However, during the period for which the benefits are paid, the employee will not be allowed to increase the amount of employment time with any other employer.

As a result of the 2019 amendments, **for periods of both disability and family leaves commencing on or after July 1, 2020:**

- Currently, an employee’s weekly TDI benefit or weekly FLI benefit equals 66 2/3% of the employee’s average weekly wage, up to a maximum of 53% of the New Jersey statewide average weekly remuneration paid to workers two years earlier, as determined by the NJDLWD. For 2019, the maximum weekly benefit is $650, based on the 2017 statewide average weekly wage of $1228.25.\(^\text{25}\)

As a result of the amendments, an employee’s weekly TDI benefit or weekly FLI benefit will equal 85% of the employee’s average weekly wage, up to a maximum of 70% of the New Jersey statewide average weekly remuneration paid to workers two years earlier, as determined by the NJDLWD. Had this change gone into effect for 2019, the maximum weekly benefit would have been $859 in 2019.

The maximum weekly benefits as of January 1, 2020 and as of July 1, 2020 will be announced by the NJDLWD on or before September 1, 2019 and will be posted at [https://nj.gov/labor/ea/rates/rateindex.html](https://nj.gov/labor/ea/rates/rateindex.html).

\(^{25}\) See NJDLWD, **EMPLOYER HANDBOOK TO NEW JERSEY’S UNEMPLOYMENT & DISABILITY INSURANCE PROGRAMS**, Chapter 1, Section 4 (Contribution Reports), at [https://nj.gov/labor/handbook/chap1/chap1sec4ContributionReports.html#6](https://nj.gov/labor/handbook/chap1/chap1sec4ContributionReports.html#6). The New Jersey statewide average weekly remuneration amounts for the years 1995 to 2017 are set forth at the NJDLWD’s **Workers’ Compensation Rates & Statistics** web page at [https://www.nj.gov/labor/wc/content/stats.html](https://www.nj.gov/labor/wc/content/stats.html).

The 2017 statewide average weekly remuneration was used to calculate the 2019 maximum weekly unemployment compensation benefit, TDI benefit, and FLI benefit payable to an employee. The maximum weekly benefits for the most recent years are set forth at [https://nj.gov/labor/ea/rates/rateindex.html](https://nj.gov/labor/ea/rates/rateindex.html).

The maximum weekly benefit is subject to reduction due to other requirements in the NJTDIBL and NJFLIBL.
Next Steps

Nonprofits need to:

- Review and, if necessary, update their leaves of absence and PTO policies to be consistent with the foregoing changes. This will be particularly important for employers with 30 to 49 employees, as those employers will be required to comply with the NJFLA as of June 30, 2019.

- Review and, if necessary, update their PTO policies to comply with the New Jersey Paid Sick Leave Act, which became law in 2018, if the policies haven’t already been reviewed. See Pro Bono Partnership’s article, New Jersey Paid Sick Leave Act, for more details.

- Educate managers about the expanded scope of the New Jersey leave and benefit laws so that they will be better able to recognize when employees are potentially entitled to job-protected leaves and are potentially eligible for wage replacement benefits from the State of New Jersey. While it would be nice if employees went directly to a nonprofit’s human resources (HR) person with leave and benefit-related questions, if they go instead to a manager, the manager needs to know how to properly respond.

An employee is not required to say “I want to take time off pursuant to the New Jersey Family Leave Act and/or the federal Family and Medical Leave Act” in order to be entitled to time off. Once a manager has been apprised of facts suggesting the need for time off for an event covered by the leave laws – for example, “I need time off to care for my sick cousin” – the employer needs to act promptly.

Consider instructing managers to:

- Direct all employees who make any requests that sound like a need for time off for a medical, family, or other reason to contact the HR person.

- Notify the HR person of the requests just in case the employees do not reach out the HR person.

- Discuss all proposed decisions to not allow an employee who took a leave of absence to return to work and all proposed disciplinary actions (whether or not related to leaves) with the HR person so that the potential for a claim of retaliation for having requested or utilized a leave of absence or

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26 During such training, remind managers about an employer’s obligation under the New Jersey Law Against Discrimination and the Americans with Disabilities Act to reasonably accommodate qualified individuals with a disability.
for having requested or received FLI benefits or TDI benefits can be evaluated.

- Be ready to start deducting from employees’ paychecks, as of January 1, 2020, the higher contributions that the employees will be obligated to make in order to fund the increased TDI benefits and FLI benefits that they will be eligible to receive starting July 1, 2020. The higher paycheck deductions, coupled with the significantly higher salary cap before deductions will cease, will be a surprise to many employees.

- Periodically check for revised posters, fact sheets, and other guidance documents issued by the NJDCR and NJDLWD and revised DS-1 and FL-1 claim forms issued by the NJDLWD.

Questions

If you have any questions about the topics discussed in this article and you are associated with a New Jersey charitable nonprofit, feel free to contact Christine Michelle Duffy from the Pro Bono Partnership, at (973) 240-6955. If your nonprofit needs assistance in revising its employee handbook or leaves of absence policy, please contact the Pro Bono Partnership lawyer with whom you usually work.

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