



Evaluation of S-2249, N.J. Family Leave Insurance

John J. Sarno, Esq.

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For Discussion Only

S-2249. A bill to extend Temporary Disability Insurance (TDI) to provide family leave benefits for workers caring for sick family members, newborn and newly adopted children

Currently, there is a debate as to whether providing wage protection benefits to employees who care for ill family members or newborns or newly adopted children would create an administrative and/or legal burden on employers with 50 or less employees (referred in as “Small Employers”) that would outweigh the benefits to workers employed by them. In a recent survey conducted by the Employers Association of New Jersey, the vast majority of Small Employers reported some form of help, primarily in the form of time off, to employees who care for ill family members or to care for newborns. While discretionary, these policies are more likely codified in an employee handbook or some other document. Much of the time, employees are permitted to use accrued paid time off for this purpose, or to use unpaid time off. S-2249 would allow employees who have no wage continuation during this time off to receive short-term disability insurance. While the duration of this benefit is unclear at this point, it would appear that if enacted it would not exceed 12 weeks per year.

Although S-2249 is referred to as a “leave law” it would not require employers to grant a leave of absence or to keep a job open with a right to guaranteed reinstatement. In that regard, it is merely an extension of the existing Temporary Disability Insurance (TDI) law, which grants 26 weeks of income insurance to disabled employees. We believe that much of the confusion about this issue is related to how TDI is perceived by many employers, particularly Small Employers. Many believe that TDI grants 26 weeks of leave. As a result, a type of social contract has emerged between Small Employers and employees who receive TDI benefits. In short, employers typically do not terminate the employment of such individuals unless there is good cause to do so. *See generally, Gerety v. Hilton Casino Resort*, NJ Supreme Court (2005) (Holding that a woman who is disabled due to her pregnancy and who takes 180 days off from work is not entitled to additional leave if men with disabilities are required to adhere to the same 180-day

maximum.). In any event, without guaranteed job protection, an employee would have to decide whether to take time off and the employer would have to decide whether to accommodate his/her return. See Hampton v. Armand Corporation, NJ Appellate Division (2005) (At will employee may be terminated while on sick leave.); see also, Rivera v. Cherry Hill Convalescent Center, US District Court for NJ (2006) (NJ has no public policy prohibiting discharge of employee who stays home to care for children.). But see Delgado v. LA Weight Loss Center's, Inc. (Terminating an employee either in retaliation for exercising her statutory rights to benefits pursuant to the state's temporary disability benefits law or in an attempt to avoid the employer's obligation to pay such temporary benefits, violates public policy.). As such, we do not expect that S-2249 will significantly disrupt the existing practices and policies of Small Employers.

What is certain, however, is that when viewed in connection with other laws and regulations, administration of S-2249 may require a sophisticated approach by Small Employers. The Family Medical Leave Act and the NJ Family Leave Act permits eligible employees who work for employers with 50 or more employees to take up to 12 weeks off to care for themselves or a family member, and to care for newborns or newly adopted children. The Americans with Disabilities Act (ADA) and the NJ Law Against Discrimination (LAD) require employers to provide reasonable accommodations to employees with disabilities, which may include granting time off for reasons relating to a disability. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, prevents sex discrimination and gender stereotyping and may require, under certain circumstances, the granting of leaves because of pregnancy and related medical reasons, and for meeting caregiving responsibilities. In addition, the ADA prohibits discrimination against employees who associate with people with disabilities.

Significantly, Title VII and the ADA already applies to employers with 15 or more employees and that engage in interstate commerce, and the LAD applies to every employer in New Jersey. As such, S-2249 may not impose an extra legal burden, *per se*, on Small Employers. It will, however, require coordination within the existing legal framework.