

LEXSTAT 41 N.J.R. 258(A)

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RULE ADOPTIONS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF UNEMPLOYMENT INSURANCE**

41 N.J.R. 258(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

Contributions, Records and Reports; Family Leave Insurance Benefits

Proposed: September 15, 2008 at *40 N.J.R. 5167(a)*.

Adopted: December 9, 2008 by David J. Socolow, Commissioner of Labor and Workforce Development.

Filed: December 10, 2008 as R.2009 d.20, **with substantive changes** not requiring additional public notice or comment (see *N.J.A.C. 1:30-4.3*).

Authority: *N.J.S.A. 43:21-25* et seq., as amended by P.L. 2008, c. 17, specifically, *N.J.S.A. 43:21-65* and *43:21-1* et seq., specifically *N.J.S.A. 43:21-7g*.

Effective Date: January 5, 2009.

Expiration Date: March 10, 2010.

Summary of Hearing Officer's Recommendations and Agency's Responses:

A public hearing regarding the proposed amendments and new rules was held on October 6, 2008 at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony regarding the proposed amendments and new rules. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, the hearing officer recommended that the Department proceed with the amendments and new rules without change. The record of the public hearing may be reviewed by contacting David Fish, Regulatory Officer, Office of Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals:

1. Jim Walsh, Program Director, New Jersey Citizen Action, Highland Park, New Jersey.

2. Lauren Agoratus, New Jersey Coordinator, Family Voices at the Statewide Advocacy Network, Newark, New Jersey.

3. Michael A. Vrancik, Director, Governmental Relations Department, New Jersey School Boards Association, Trenton, New Jersey.

4. John Rogers, Vice President, Human Resources Issues, New Jersey Business & Industry Association, Trenton, New Jersey.

COMMENT: Mr. Walsh supports all of the definitions included within the proposed amendments. He adds, however, that the proposed amendments do not include a definition for the term "parent." Mr. Walsh suggests that the Department adopt for use within *N.J.A.C. 12:16*, the definition of the term "parent," which is contained within the New Jersey Family Leave Act.

The commenter also expresses concern about a statement, which appears within the Summary section of the notice of proposal, which indicates, "Family leave insurance benefits, however, will not be paid until after June 30, 2009; that is, P.L. 2008, c. 17, states that claims for family leave insurance benefits shall be paid, subject to the limitations set [page=259] forth in P.L. 2008, c. 17, for any period of family temporary disability leave taken by a covered individual, which commences after June 30, 2009." Mr. Walsh states with regard to this sentence:

It could be interpreted that the first line of the sentence and the final line are in conflict. The first line clearly states that benefits will not be paid until after June 30, 2009. However, the final line could confuse employers and employees because it is unclear what the statement in the final line, "which commences after June 30, 2009," is referring to. It could be taken to reference family temporary leave (sic) taken by a covered individual, whereby someone would be denied paid leave if they took time off prior to June 30, 2009, or it could be taken to reference the actual start date of the program, whereby someone would be eligible for Family Leave Insurance regardless of prior need for leave.

It is outrageous to think that someone would be unable to collect paid leave simply because the State was not able to get the program up and running before a legitimate need for leave had arisen in his or her family. The Legislature did not intend for workers to delay care until after June 30, 2009 because of fear they would not be able to receive a paid benefit, and they certainly did not intend for a worker to be unable to continue care because they don't have income they are entitled to after June 30, 2009.

RESPONSE: With regard to Mr. Walsh's first concern, Mr. Walsh correctly observes that the Department should have included a definition for the term "parent of a covered individual" within proposed new N.J.A.C. 12:16-1A.1, since that term appears within the definition of the term "family member." As to the appropriate definition for the term, "parent of a covered individual," P.L. 2008, c. 17 contains a definition for the term. Inasmuch as the purpose of the proposed amendments and new rules is to implement P.L. 2008, c. 17, the Department must use the definition for the term "parent of a covered individual," which appears within P.L. 2008, c. 17, as opposed to the definition suggested by Mr. Walsh, namely, the definition for the term "parent," which appears in the New Jersey Family Leave Act. This change on adoption is necessary in order to ensure that the proposed amendments and new rules are consistent with P.L. 2008, c. 17. The change on adoption does not enlarge or curtail either the scope of the proposed amendments and new rules or those who will be affected by them. Consequently, the Department asserts that this modification is appropriate on adoption.

Mr. Walsh's second concern is that, "someone would be unable to collect paid leave simply because the State was not able to get the program up and running" before July 1, 2009. This concern is unwarranted. The language within the Summary, which Mr. Walsh maintains is confusing, namely, "P.L. 2008, c. 17 states that claims for family leave insurance benefits shall be paid . . . for any period of family temporary disability leave taken by a covered individual which commences after June 30, 2009," was taken verbatim from the law. In any event, Mr. Walsh can rest assured that where a covered individual files a claim on or after July 1, 2009 for family leave insurance benefits, and where that covered individual meets the statutory and regulatory criteria for eligibility, he or she will be paid the appropriate benefits.

COMMENT: Ms. Agoratus supports the proposed amendments and new rules.

RESPONSE: The Department thanks the commenter for her support.

COMMENT: Mr. Vrancik submits the following two comments:

1. N.J.A.C. 12:16-1A.1 should clarify whether "physical or mental impairment" includes drug addiction and alcohol dependency.

2. *N.J.A.C. 12:16-4.11* states that the first seven days of family leave insurance benefits payments are taxable if they are paid out of a private plan. Please clarify if this means that they are not taxable if paid from the State plan and the reason for the private/public difference.

RESPONSE: Regarding Mr. Vrancik's first comment, as indicated in the notice of proposal (*40 N.J.R. 5167(a)*), the Department has taken the definition for the term "physical or mental impairment" directly from 29 CFR 1630(h). The Department intends to interpret the meaning of this term consistently with the Federal government's interpretation of the same term as it appears within the Federal regulations. Currently, the term "physical or mental impairment," as it appears in 29 CFR 1630(h), is interpreted to include drug addiction and alcoholism. The Department will follow suit.

Regarding Mr. Vrancik's second comment, it is first important to note, as indicated in the notice of proposal, that each mention within *N.J.A.C. 12:16* of "taxable remuneration," is referring to whether benefits, including family leave insurance benefits, are considered remuneration from which employees and/or employers are expected to remit unemployment compensation, temporary disability and family leave insurance contributions. The term "taxable remuneration" within *N.J.A.C. 12:16*, does not refer to whether benefits are taxable for Federal income tax purposes. That said, the reason that *N.J.A.C. 12:16-4.11(a)* states only that family leave insurance benefits payments made to employees under an approved private plan (as opposed to under the State plan) are considered taxable remuneration if the payments are for a period of seven or less consecutive days following the first day that the individual establishes a claim, is that due to the waiting period requirement imposed upon claimants in the State plan, a State plan claimant will never receive benefits during the first seven consecutive days following the first day that he or she establishes the claim. Because no State plan claimant will receive family leave insurance benefits during the waiting period, there is no reason to have a rule pertaining to whether such benefits are considered "taxable remuneration." Under an approved private plan, a claimant may receive benefits during that first week. Thus, it is the Department's belief that *N.J.A.C. 12:16-14.1(a)* is necessary. Incidentally, existing *N.J.A.C. 12:16-4.10(a)*, pertaining to temporary disability (as opposed to family leave insurance) benefits contains a virtually identical provision relative to whether such benefits are considered taxable remuneration.

Specifically, *N.J.A.C. 12:16-4.10(a)* states, "Payments made to employees under an approved Private Plan shall be considered as taxable remuneration, if payments are for a period of seven or less consecutive days following the date of disability."

As explained within the notice of proposal for amendments and new rules within *N.J.A.C. 12:15*, 17 and 21 (the second of the two family leave insurance benefits rule proposals at *40 N.J.R. 5509(a)*), the format and content of the family leave insurance benefits rules are modeled on the rules that govern the temporary disability benefits (TDB) program. P.L. 2008, c. 17, the law which establishes family leave insurance benefits, amends the Temporary Disability Benefits Law. Furthermore, pursuant to P.L. 2008, c. 17, the employee contributions, which will be used to pay State plan family leave insurance benefits claims and claims for family leave insurance benefits during unemployment, are to be deposited into a special account within the State Disability Benefits Fund (the same fund from which temporary disability benefits are paid). Thus, with new *N.J.A.C. 12:16-4.11* (remuneration; family leave insurance benefits), the Department is seeking to essentially replicate *N.J.A.C. 12:16-4.10*, which addresses whether temporary disability benefits payments are considered taxable remuneration under the unemployment compensation law. Some changes were necessary in order to address the issue of family leave insurance benefits taken on an intermittent basis (a situation, which does not arise within the context of temporary disability benefits), but otherwise, the two sections mirror one another.

COMMENT: Mr. Rogers takes issue with the Department's decision to publish the two notices of proposal regarding implementation of the family leave insurance benefits program in two separate consecutive issues of the New Jersey Register; that is the September 15, 2008 issue and the October 6, 2008 issue. He states that the September 15, 2008 notice of proposal--the proposal at issue in this notice of adoption--is limited to tax treatment of the family leave insurance benefits, rather than the proper withholding and remittance of the family leave insurance benefits "leave tax." Mr. Rogers adds, "[s]ince benefits do not begin until July 1, 2009, it is unclear why the Department proceeded with this proposal instead of focusing on how employers must withhold and remit taxes to the Department." He concludes:

This has put the Department, employers and employees at a significant disadvantage. While P.L. 2008, c. 17 clearly notes that the tax must be withheld beginning January 1, 2009; there has been no official guidance provided to the employer community regarding how this must be accomplished or how the remittance of these taxes will occur as of this writing [Mr. Rogers' comments to the Department are dated November 14, 2008].

[page=260] RESPONSE: P.L. 2008, c. 17, was signed into law by the Governor on May 2, 2008. Within approximately one week of the bill signing, the Department posted information on its website regarding the family leave insurance benefits program, including the following:

(The family leave insurance benefits program) raises revenue to pay the FLI benefits through an assessment on the worker's wages beginning January 1, 2009. The worker FLI rate for calendar year of 2009 is 0.09%. The worker FLI rate for calendar year 2010, and subsequent calendar years, will be 0.12%. The worker FLI rate will be multiplied against the taxable wages subject to the State FLI plan. You will report the taxable wages subject to the State plan family leave insurance program on the Employer Quarterly Report, NJ927. The worker contributions for FLI will be remitted together with the other contributions due on the NJ927.

Also, in May 2008, the Department mailed a notice directly to all large employers in New Jersey with 2,000 or more employees. The contents of that notice follow verbatim:

**IMPORTANT NOTICE TO EMPLOYERS
FAMILY LEAVE INSURANCE IS NOW LAW**

In accordance with P.L. 2008, c. 17, which was signed into law by Governor Corzine on May 2, 2008, your employees will be covered for Family Leave Insurance (FLI) benefits beginning in 2009. Some important facts regarding FLI:

- The law applies to all private and governmental employers subject to the "Unemployment Compensation Law," (*R.S. 43:21-1 et seq.*), including local governmental employers who have chosen not to elect disability insurance coverage under the New Jersey Temporary Disability Benefits Law.
- There is no employer contribution to the program. However, beginning January 1, 2009 you will be required to withhold 0.09% (0.0009) of your employees' taxable wages as defined in the Unemployment Compensation Law. This is the same wage upon which the withholding for unemployment compensation is based (\$ 27,700 in 2008; the 2009 figure will be available after September 1, 2008). The withholding rate increases to 0.12% (0.0012) beginning in 2010.
- You will report the wages and deductions and submit payment with Form NJ-927, Employer's Quarterly Report.
- In lieu of the state FLI plan, you may choose to provide self-coverage or arrange to have your employees covered by a private insurance carrier. Both of these alternatives require prior approval by the Division of Temporary Disability Insurance.
- Beginning July 1, 2009, your employees may apply for up to six weeks of FLI benefits during leave taken to provide care for a sick family member or to care for a newborn or newly adopted child. Eligible applicants who are covered by the state FLI plan will receive weekly benefits amounting to no more than two-thirds of their weekly pay, subject to the same maximum as temporary disability insurance (TDI) for an individual's own disability (the maximum weekly benefit rate for TDI is \$ 524 in 2008).

For more information, please visit our website: <http://lwd.dol.state.nj.us/labor/employer/ea/legal/FLI.html>.

On June 2, 2008, the Department mailed directly to all governmental entities in New Jersey a notice regarding the family leave insurance benefits program. The contents of that notice follow verbatim:

**IMPORTANT NOTICE TO GOVERNMENTAL EMPLOYERS
FAMILY LEAVE INSURANCE IS NOW LAW**

In accordance with P.L. 2008, c. 17, which was signed into law by Governor Corzine on May 2, 2008, your employees will be covered for Family Leave Insurance (FLI) benefits in 2009. Please note that even if you have chosen not

to elect coverage for benefits during your employees' own disability under the New Jersey Temporary Disability Benefits Law, there is no such exemption for FLI. Some important facts regarding FLI:

-- There is no employer contribution to the program. However, beginning January 1, 2009 you will be required to withhold 0.09% (0.0009) of your employees' taxable wages as defined in the Unemployment Compensation Law. This is the same wage upon which the withholding for unemployment compensation is based (\$ 27,700 in 2008; the 2009 figure will be available after September 1, 2008). The withholding rate increases to 0.12% (0.0012) beginning in 2010.

-- You will report the taxable wages subject to the state plan Family Leave Insurance (FLI) program on the "Employer Quarterly Report," NJ927. The worker contributions for FLI will be remitted together with the other contributions due on the NJ927.

-- In lieu of the state FLI plan, you may choose to provide self-coverage or arrange to have your employees covered by a private insurance carrier. Both of these alternatives require prior approval by the Division of Temporary Disability Insurance.

-- Beginning July 1, 2009, your employees may apply for up to six weeks of FLI benefits during leave taken to provide care for a sick family member or to care for a newborn or newly adopted child. Eligible applicants who are covered by the state FLI plan will receive weekly benefits amounting to no more than two-thirds of their weekly pay, subject to the same maximum as temporary disability insurance (TDI) for an individual's own disability (the maximum weekly benefit rate for TDI is \$ 524 in 2008).

For more information, please visit our website: <http://lwd.dol.state.nj.us/labor/employer/ea/leqal/FLI.html>.

Accompanying the August 2008 rate notice, which is sent to **every** employer in New Jersey covered under the unemployment compensation law, the Department included a notice regarding the family leave insurance program. The contents of that notice follow verbatim:

Family Leave Insurance

In accordance with P.L. 2008, c. 17, which was signed into Law by Governor Corzine on May 2, 2008, your employees will be covered for paid Family Leave Insurance (FLI) beginning in July of 2009. Some important facts regarding Family Leave Insurance (FLI):

-- Applies to all private and governmental employers subject to the "Unemployment Compensation Law," (*R.S. 43:21-1 et seq.*), including local governmental employers who have chosen not to elect disability coverage under the New Jersey Temporary Disability Benefits Law.

-- There is no employer contribution to the program. However, beginning January 1, 2009, all employers subject to the "Unemployment Compensation Law," (*R.S.43:21-1 et seq.*), will be required to withhold 0.09% (0.0009) of your employees' taxable wages. The withholding rate will increase to 0.12% (.0012) beginning in January of 2010.

-- You will be required to report the taxable wages and FLI withholdings on the form NJ927 (Employer's Quarterly Report) and submit quarterly, with payment.

-- In lieu of the state FLI plan, you may choose to provide self-coverage or arrange to have your employees covered by a private insurance carrier. Both of these alternatives require prior approval by the Division of Temporary Disability Insurance.

-- Beginning July 1, 2009 your employees may apply for up to six weeks of paid Family Leave Insurance benefits to provide care for a sick family member or care for a newborn or newly adopted child.

For more information, please visit our website: <http://lwd.dol.state.nj.us/labor/employer/ea/legal/FLI.html>.

As is clear from this recitation, in each instance, the Department has advised that the employee contributions to the State Disability Benefits Fund for family leave insurance benefits will be reported on and remitted with the form NJ927. The current version of the NJ927 has been in use since 1998. Using that form, all covered employers remit to the State, among other things, employer and employee contributions to the State Unemployment Compensation Fund, the State Disability Benefits Fund, the Workforce Development Partnership Fund (and, at one time in the past, the Health Care Subsidy Fund). It is safe to say that all covered employers should be familiar with the NJ927 and its use in reporting and remitting contributions. What the State intends to do by way of incorporating the new employee contribution to the State Disability Benefits Fund for family leave insurance benefits is to add a line to the NJ927 for this purpose. Mr. Rogers' observation that "there has been no official guidance provided to the employer community regarding how this [page=261] (tax remittance) must be accomplished or how the remittance of these taxes will occur as of this writing," is simply not accurate. Furthermore, as explained within the notice of proposal for amendments and new rules within *N.J.A.C. 12:15*, 17 and 21 (the second of the two family leave insurance benefits rule proposals, which appeared in the October 6, 2008 issue of the New Jersey Register over one month prior to Mr. Rogers' comments having been submitted to the Department on November 14, 2008), the format and content of the family leave insurance benefits rules are modeled on the rules that govern the temporary disability benefits (TDB) program. The Department rules governing the remittance of contributions, and the keeping of records and reports, relative to the TDB program are found within *N.J.A.C. 12:16* and have existed for many years without any apparent confusion on the part of the employer community. The Department's proposed amendments and new rules within *N.J.A.C. 12:16* simply address the family leave insurance benefits program and the contributions, records and reports requirements relative to that program in the same manner as it has with regard to the TDB program for these many years, with appropriate modifications made for circumstances unique to family leave insurance benefits (such as intermittent family leave insurance benefits).

As to the timing of the two notices of proposal (September 15, 2008 and October 6, 2008), the Department explained in the September 15, 2008 notice of proposal why it believes that it was important to publish the proposal regarding contributions, records and reports as quickly as possible. The larger proposal--regarding amendments and new rules within *N.J.A.C. 12:15*, 17 and 21--was published in the next available publication of the New Jersey Register, on October 6, 2008. It was with the regulated community (including the employer community) in mind that the Department made the extra effort to get the September proposal published three weeks early. The comment periods for the two proposals overlapped significantly and gave more than ample opportunity for reviewing the two proposals side-by-side. Again, since the law requires the collection of contributions starting on January 1, 2009, whereas benefits will not be paid until after June 30, 2009, the Department wanted to make every effort to publish the proposal relative to contributions, records and reports (*N.J.A.C. 12:16*) at the earliest possible date, even if that was only three weeks prior to publication of the larger proposal.

COMMENT: Mr. Rogers objects to the inclusion of certain definitions within *N.J.A.C. 12:16*. Specifically, he states:

The terms that are necessary to guide employers and employees relating to the taxability of FLI benefits are very limited. The Department has not demonstrated why definitions for terms such as, but not limited to, "bond" or "bonding;" "care;" "physical or mental impairment;" or "serious health condition;" are germane to the regulations found in [*N.J.A.C.] 12:16-4.1, 12:16-4.2 or 12:16-4.11*.

RESPONSE: The term "family leave insurance benefits" is used within the proposed amendments and new rules at *N.J.A.C. 12:16-4.1, 4.2 and 4.11*. Thus, inclusion within *N.J.A.C. 12:16* of a definition for that term is essential. Within the definition of the term "family leave insurance benefits," the terms "care," "family member," "bond" and "child" are used, which in turn necessitates the inclusion of definitions for those terms. Within each of these secondary terms certain other terms or phrases are used, which in turn requires the inclusion of definitions for those terms and phrases, such as "incapable of self care" and "physical or mental impairment." The Department included only those definitions for terms and phrases used within *N.J.A.C. 12:16*, which it believes are absolutely necessary in order to ensure consistency of interpretation between all of the proposed amendments and new rules within *N.J.A.C. 12:15*, 16, 17 and 21; that is, the amendments and new rules that implement P.L. 2008, c. 17, the law, which establishes the family leave insurance benefits program.

COMMENT: Mr. Rogers states the following:

Proposed regulation [N.J.A.C.] 12:16-4.11(c)2 clarifies that family leave insurance benefits would not be considered taxable remuneration ". . . if the claimant is eligible for at least one day of family leave insurance benefits in three separate weeks subsequent to the week in which the claim for family leave insurance benefits was established."

The Association understands this language will prevent family leave insurance benefits paid within the first seven consecutive days from being considered taxable remuneration in cases where an employee takes the benefits intermittently over a period of four weeks or more.

The Association notes that the Department has never distributed social insurance benefits on an intermittent basis. Again, neither the proposed regulations, nor the other materials released by the Department have clarified the employer's role in remitting the proper wages to the Department. Further, since the enabling statute permits an employer to require ". . . total number of days work of [family leave] disability benefits reduced by the number of days of leave at full pay paid by the employer to the individual." it is unclear how the Department will apply this language given the many variables that exist during a period of intermittent family temporary disability leave.

Mr. Rogers recommends that the Department "should elaborate on how intermittent benefits will be taxed under this proposal and the potential impact, if any, on the employer."

RESPONSE: The definition for the term "waiting period," which appears within proposed N.J.A.C. 12:21-1.3 (see 40 N.J.R. 5509(a)--the October 6, 2008 issue of the New Jersey Register) should assist Mr. Rogers in ascertaining the tax treatment of family leave insurance benefits taken on an intermittent basis. Specifically, the definition states in pertinent part that, "In the case of intermittent family leave, in a single period of family leave . . . family leave insurance benefits shall be payable with respect to the first day of leave taken after the first one-week period following the commencement of the period of family leave and each subsequent day of leave during that period of family leave; and if benefits become payable on any day after the first three weeks in which leave is taken, then benefits shall also be payable with respect to any leave taken during the first one-week period in which leave is taken."

Regarding whether family leave insurance benefits paid for intermittent family leave taken during the first one-week period following commencement of the period of family leave are considered taxable remuneration, as indicated within proposed new N.J.A.C. 12:16-4.11(a), those benefits would be considered taxable remuneration, with the following exception: as provided under N.J.A.C. 12:16-4.11(c)2, where the claimant is eligible for at least one day of family leave insurance benefits in three separate weeks subsequent to the week in which the claim for family leave insurance benefits was established, the family leave insurance benefits payments made to that claimant for Intermittent family leave taken within the first seven consecutive days following the first day that the individual established the claim, would not be considered taxable remuneration. With this approach, the Department is seeking to replicate the tax treatment of family leave insurance benefits taken on a continuous basis (which, in turn, is intended to replicate the tax treatment of temporary disability benefits taken on a continuous basis). With regard to Mr. Rogers' claim that the Department has never distributed social insurance benefits on an intermittent basis," this is not entirely accurate. Specifically, the temporary disability insurance law contains a relapse provision within the statutory definition of the term "period of disability" (N.J.S.A. 43:21-27(g)). This provision requires that the Department treat a period of disability as continuous in the event that a claimant returns to work for less than 14 days while collecting temporary disability insurance benefits. Thus, where a claimant is out of work due to a compensable disability for 14 days, returns to work for two days, goes back on leave due to the compensable disability for one day, then returns to work for two days, then goes back on leave due to the compensable disability for six weeks, that claimant would be eligible to receive temporary disability Insurance benefits for that one stand-alone day, in addition to the eight weeks.

The following individuals testified at the October 6, 2008 public hearing:

1. Jim Walsh, Program Director, New Jersey Citizen Action, Highland Park, New Jersey.
2. John Rogers, Vice President, Human Resources Issues, New Jersey Business & Industry Association, Trenton, New Jersey.

COMMENT: The comments of Messrs. Walsh and Rogers during the public hearing addressed the same concerns raised by each in their respective written comments, summarized above.

RESPONSE: The Department's responses to the comments of Messrs. Walsh and Rogers are identical to its responses to their written comments. Those responses are listed above.

[page=262] **Federal Standards Statement**

The adopted amendments and new rules are governed by *N.J.S.A. 43:21-1* et seq., as amended by P.L. 2008, c. 17, and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***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.

"Bond" or "Bonding" with a newborn child or newly adopted child means to develop a psychological and emotional attachment between a child and his or her primary caregiver(s). The development of this attachment or bond between child and caregiver(s) requires being in one another's presence.

"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.

"Child" means 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.

"Civil union" means a civil union as defined in *N.J.S.A. 37:1-29*.

"Domestic partner" means a domestic partner as defined in *N.J.S.A. 26:8A-3*.

"Family leave" or "family temporary disability leave" means leave taken by a covered individual from work with an employer to:

1. Participate in the providing of care for a family member of the individual made necessary by a serious health condition of the family member; or
2. Be with a child during the first 12 months after the child's birth, if the individual or the domestic partner or civil union partner of the individual, is a biological parent of the child, or the first 12 months after the placement of the child for adoption with the individual.

"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 Benefits Law), because the individual is unable to perform the duties of the individual's employment due to the individual's own disability.

"Family member" means a child, spouse, domestic partner, civil union partner or parent of a covered individual.

"Family temporary disability benefits" or "family leave insurance benefits" means the benefits payable to a covered individual under P.L. 2008, c. 17 in order to compensate for wage loss suffered because of the need of the covered individual to participate in providing care for a family member or to bond with a newborn or newly adopted child.

"Incapable of self-care," solely for the purpose of defining the term "child," means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities, such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

"Parent of a covered individual" means 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.

"Physical or mental impairment," solely for the purpose of defining the term "child" means:

1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Private plan" means a private plan approved by the Division as defined in *N.J.S.A. 43:21-32*.

"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).

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

"Week" means a period of seven consecutive days.

"12-month period" means, with respect to an individual who establishes a valid first claim for family leave insurance benefits, the 365 consecutive days that begin with the first day that the individual establishes the claim.

SUBCHAPTER 4. REMUNERATION

12:16-4.1 Remuneration defined

(a) (No change.)

(b) The following remuneration issues are discussed in *N.J.A.C. 12:16-4.2* through 4.18.

1.-15. (No change.)

16. Deferred payments;

17. Co-employed individuals, employee leasing clients; and

18. Family leave insurance benefits payments.

12:16-4.2 Sick leave payments and continuation pay for family leave

(a) Sick leave payments (also known as continuation pay) and continuation pay for family leave made by employers to employees for periods of disability or for periods of family leave are wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes.

(b) Those types of sick leave payments and continuation pay for family leave deemed wages and therefore taxable are:

1.-3. (No change.)

4. Payment of unused sick leave made to an employee while still in employment;

5. Payment of the difference between family leave insurance benefits paid under the State plan or an approved private plan and full salary.

[page=263] (c) Those types of sick leave payments and continuation pay for family leave deemed benefits and therefore non-taxable are:

1.-6. (No change.)

7. Payment of sick leave made after retirement or separation from employment;

8. Family leave insurance benefits paid from the State plan;

9. Family leave insurance benefits paid by an insurance carrier under an approved private plan (see *N.J.A.C. 12:16-4.11* for exceptions);

10. Family leave insurance benefits paid by a union under an approved self-insured private plan (see *N.J.A.C. 12:16-4.11* for exceptions); and

11. Family leave insurance benefits paid by the employer under an approved self-insured private plan (see *N.J.A.C. 12:16-4.11* for exceptions).

12:16-4.11 Family leave insurance benefits payments

(a) Family leave insurance benefits payments made to employees under an approved private plan shall be considered taxable remuneration if the payments are for a period of seven or less consecutive days following the first day that the individual establishes a claim.

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(b) Family leave insurance benefits payments made for periods after the seventh consecutive day following the first day that the individual establishes a claim shall not be considered taxable remuneration.

(c) Family leave insurance benefits payments made for seven or less consecutive days following the first day that the individual establishes a claim referred to in (a) above would not be considered taxable remuneration when:

1. The period during which family leave insurance benefits have been paid extends to 22 consecutive days, or
2. The claimant is eligible for at least one day of family leave insurance benefits in three separate weeks subsequent to the week in which the claim for family leave insurance benefits was established.

Recodify existing 12:16-4.11 through 4.17 as 4.12 through 4.18 (No change in text.)