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RULE ADOPTIONS

LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS

39 N.J.R. 781(c)

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

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

Rules Pertaining to the Family Leave Act

Proposed: November 6, 2006 at 38 N.J.R. 4627(a).

Adopted: February 2, 2007 by Gary LoCassio, Deputy Director, Division on Civil Rights.

Filed: February 6, 2007 as R.2007 d.77, **with substantive and technical changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-6.3).

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

Effective Date: February 6, 2007, Readoption;

March 5, 2007, Amendments, Repeal and New Rule.

Expiration Date: February 6, 2012.

Summary of Public Comments and Agency Responses:

The public comment period closed on January 5, 2007. The Division received two sets of written comments, one set from the Employers Association of New Jersey (EANJ) and one set from NJ Time to Care.

1. COMMENT: EANJ requested clarification whether the requirement in the definition of "eligible employee" in N.J.A.C. 13:14-1.2 that the individual be employed by the same employer in the State of New Jersey for 12 months or more means that the 12-month period of employment be consecutive.

RESPONSE: There is no requirement that the employment be consecutive, as long as the employee has been employed by the same employer for 12 months. The definition of "eligible employee" also includes a requirement that the employee have 1,000 or more base hours during the preceding 12-month period. The 1,000-base hour requirement ensures that an employee has worked a sufficient amount of time during the previous 12 months in order to qualify for leave under the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq. (NJFLA).

2. COMMENT: EANJ notes that the definition of "serious health condition" is being amended to be more consistent with the Federal Family and Medical Leave Act, 29 U.S.C. §§2601 et seq. (FMLA), and suggests that language in N.J.S.A. 34:11B-4(e)(1) regarding medical certifications be interpreted to require that a medical certification to support a request for leave to include a statement that the individual's condition meets the qualification of a serious health condition in the regulations.

RESPONSE: In the rules proposed for readoption, the rule addressing certifications by a medical provider, N.J.A.C. 13:14-1.10(b), is proposed for readoption without amendment. The Division agrees with the commenter that the suggested language may be an appropriate interpretation of the NJFLA medical certification requirement and notes that the suggested language is consistent with the FMLA rules concerning medical certifications. See 29 CFR 825.306(b). However, the Division believes that the regulatory change suggested is a substantive change that cannot be made upon adoption of the proposal. Therefore, the Division will propose the suggested change in a future rulemaking proposal.

3. COMMENT: EANJ notes that the proposed amendments to N.J.A.C. 13:14-1.4(d) allow for an employer to select among four methods to calculate the 24-month period in which leave under the NJFLA may be taken, and that if an employer does not make a selection that the option most beneficial to the employee will be used. EANJ questions what method of notification may be used and whether the employer is required to develop a policy regarding their NJFLA obligations.

RESPONSE: While the Division believes that it is advantageous for both employers and employees if an employer were to maintain an NJFLA policy, the rule in question does not mandate such a policy. It is the Division's intention that if an employer chooses to select a particular method for determining the 12-month period, that it provide notice to all employees of that method. Such an approach is consistent with the Legislature's requirement that employers use appropriate means to keep employees informed of their rights under the NJFLA. N.J.S.A. 34:11B-6. Upon adoption, the Division is changing N.J.A.C. 13:14-1.4(d) to clarify that an employer shall provide notice to all employees of the method selected. Since the change is intended to clarify the proposal, it is not a substantial change requiring additional public notice or comment. See N.J.A.C. 1:30-6.3(c)2.

4. COMMENT: EANJ notes that new rule N.J.A.C. 13:14-1.14 provides that if an employer has no written policies, manuals or handbooks, that it must provide written guidance to employees concerning their rights and obligations under the NJFLA. EANJ questions whether this obligation applies to all employees, or only those requesting leave, whether employers are now required to adopt a policy regarding NJFLA obligations, whether posting the Division's NJFLA poster would suffice to satisfy this obligation, and whether the Division will be supplying suggested language to satisfy the regulatory obligation.

RESPONSE: Similar to the Response to the previous Comment, while the Division believes that it is advantageous for both employers and employees if an employer were to maintain an NJFLA policy, the rule in question does not mandate such a policy. The new rule does require that in the absence of employee policies, manuals and handbooks, an employer must provide written guidance on the NJFLA to its employees. The provision of written guidance required in N.J.A.C. 13:14-1.14(b) is in addition to, and not satisfied by, the posting of the Division NJFLA poster, which is required by N.J.A.C. 13:14-1.14(a). It is also the Division's intention that such guidance be provided to all employees,

not just those requesting leave, so that all employees are informed as to their rights and obligations under the NJFLA. Upon adoption, the Division is modifying N.J.A.C. 13:14-1.14(b) to make clear that all employees are to be provided the written guidance. Since the change is intended to clarify the proposal, it is not a substantial change requiring additional public notice or comment. See N.J.A.C. 1:30-6.3(c)2. It must be remembered that N.J.A.C. 13:14-1.14(b) only applies to those employers who do not maintain written policies, manuals and handbooks. To address EANJ's comment about suggested language by the Division to satisfy the obligations of N.J.A.C. 13:14-1.14(b), the Division notes that it maintains a fact sheet concerning rights and obligations under the NJFLA. The Division is changing N.J.A.C. 13:14-1.14(b) upon adoption to provide that the requirements of this rule may be satisfied by an employer through the dissemination of the Division's NJFLA fact sheet to its employees. This change upon adoption imposes no additional obligations on employers, but merely identifies a method of complying with the rule. As such, it is a minor substantive change not affecting the scope of the proposal not requiring additional public notice and comment. See N.J.A.C. 1:30-6.3(c)3.

5. COMMENT: EANJ notes the example provided in N.J.A.C. 13:14-1.6(b)1 regarding an eligible employee who is on disability leave for 10 weeks for the birth of her child. EANJ questions whether if the employee requests two addition weeks under the FMLA to care for the newly born child, may the employer assign that time to the employee's entitlement under the NJFLA.

RESPONSE: The situation posed in the comment is governed by N.J.A.C. 13:14-1.6(a), which provides that when an employee requests leave for a reason covered under both the FMLA and NJFLA, the leave simultaneously counts against the employee's entitlement under both laws. Accordingly, when an eligible employee requests leave to care for a newly born or adopted child, an employer may count time off taken for this reason against the NJFLA entitlement.

6. COMMENT: EANJ notes that the example set forth in N.J.A.C. 13:14-1.6(c) provides that an employee who is disabled and receiving benefits under the Temporary Disability Benefits law is entitled to begin her 12 weeks of NJFLA to care for a newly born child. EANJ questions whether, in such a case, an employer may automatically assign such time as NJFLA or must the employee make a specific request.

RESPONSE: The Division notes that the comment references a provision that was not amended upon readoption. In addressing the query posed in the comment, an employer may designate leave time granted to an employee against the employee's NJFLA entitlement when the employee indicates that the leave is requested for a reason covered by the NJFLA, even if there is not a specific request to utilize NJFLA. Under the example cited in N.J.A.C. 13:14-1.6(c), if the employee indicates that she is requesting additional leave after the exhaustion of her FMLA entitlement to care for the newly-born child, then the employer may designate any leave granted as NJFLA leave even if there is not a specific request to utilize NJFLA leave. However, it is important to remember that the NJFLA provides that leave taken for the birth or placement for adoption may commence at any time within a year after the date of birth or placement for adoption, N.J.S.A. 34:11B-4(c), and that an employer cannot force an employee to take leave under the NJFLA. Thus, under the example cited in N.J.A.C. 13:14-1.6(c), if the employee indicates that a leave extension is needed only for the employee's own disability, and not for the care of the child, the employer may not designate the leave as NJFLA leave. Nevertheless, in the cited example it may be in an employee's best interest to make a request to utilize leave under the NJFLA, since the employee who has exhausted her FMLA entitlement may want the job protection provided by the NJFLA. If the employee does not invoke NJFLA for care of the child, her request for additional leave for her own disability would then be governed by provisions related to reasonable accommodation for her disability, under which the extension of the leave as a reasonable accommodation would be subject to an undue hardship defense by the employer. See N.J.A.C. 13:13-2.5. Consistent with the intent of the NJFLA, an employer confronted with circumstances similar to the example cited in N.J.A.C. 13:14-1.6(c) should ensure that an employee is informed of her rights under the NJFLA in order to make an informed decision regarding her use of leave under the NJFLA.

7. COMMENT: NJ Time to Care notes that the stated goal of some of the proposed amendments is to ensure consistency with the FMLA in an effort to minimize the burden on employers implementing both laws. NJ Time to Care finds this goal to be troublesome, and believes it is a backward step to reduce protections under the NJFLA to make

them more consistent with the FMLA.

RESPONSE: The Division appreciates the concerns of NJ Time to Care. However, the Division believes that the proposed amendments can assist employers in improving the administration of the NJFLA and FMLA without unduly burdening eligible employees in their attempts to take leave under the NJFLA. The Division has attempted to achieve such a balance in the proposed amendments.

8. COMNENT: NJ Time to Care objects to the amendment to N.J.A.C. 13:14-1.5(d)1, which would increase the period from 15 days to 30 days for an employee to provide notice to an employer that leave is needed to care for a family member with a serious health condition. The commenter believes that doubling the required number of days for notice that an employee must give to an employer simply to make it easier to track administratively places an undue burden on the employee and impacts their ability to take leave.

RESPONSE: The Division does not believe the increase in the number of days to provide notice to the employer would adversely affect an employee's ability to take needed leave, since N.J.A.C. 13:14-1.5(d)1 expressly provides that an employee need not give 30 days notice where emergent circumstances warrant shorter notice. However, in those cases where the employee knows of his or her need for leave in advance of 30 days, the Division believes the 30-day notice period is appropriate in order for the employer to have sufficient time to make arrangements to address the employee's absence from work.

9. COMMENT: NJ Time to Care is troubled about the Division's concern for protecting against possible employee abuse of NJFLA, when the Division does not document any such abuses or the source of this concern.

RESPONSE: In the time that the Division has been enforcing the NJFLA, it has encountered isolated instances of possible employee abuse. Nonetheless, in proposing these amendments the Division has attempted to address the administrative concerns of employers who must implement both the NJFLA and FMLA, without providing undue interference with the right of any employee to take leave under the NJFLA and at the same time ensuring that employees are adequately informed of these rights under the NJFLA. The Division will continue to try to achieve this balance as it implements this statue.

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 NJFLA, 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. Additionally, wherever possible consistent with the requirements of the NJFLA, the Division has adopted amendments to make the rules consistent with those for the FMLA. A detailed explanation of the rules affected is contained in the proposal Summary at 38 N.J.R. 4627(a), 4627-4628.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 13:14.

Full text of the adopted amendments and new rule follows (additions to the proposal indicated in boldface with asterisks ***thus***; deletions from the proposal indicated in brackets with asterisks *[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) 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 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 ***that employees are notified of the alternative chosen and*** 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 falls 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 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; ***and***

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 abrother and a sister) at the same time, provided such employees are otherwise eligible for the leave.

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]* ***each of its*** employee***s*** concerning all the employee's rights and obligations under the Act. ***Employers may duplicate and provide its employees a copy of the NJFLA Fact Sheet available on the Division's website,*** www.njcivilrights.org, ***to provide such guidance.****

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