

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
Department of Labor and Workforce Development
P.O. Box 110, 13th Floor
Trenton, NJ 08625-0110

October 30, 2008

**Re: Family Leave Insurance Benefits Rule Proposals –
Issue Date September 15, 2008**

Dear Mr. Fish:

Thank you for the opportunity to comment on the first set of Rule Proposals concerning Family Leave Insurance Benefits (hereinafter “FLI”). The Employers Association of New Jersey (EANJ) submits these comments only to the proposals issued on September 15, 2008 concerning FLI definitions.

12:16-1A.1 Definitions

"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.**

Absent from this proposed definition is a definition of the term “participate in the providing of care.” The FLI statute states such a leave is covered when an individual takes time from work to *“participate in the providing of care, as defined in the Family Leave Act and regulations adopted pursuant to that act”* 43:21-26(3) (o). However, neither the Family Leave Act, nor the regulations pursuant to that Act, utilize the terminology “participate in the providing of care”; rather both simply define “providing care.”

EANJ suggests the following definition: *“Participate in providing of care” means actively engaged in directly providing care as a caregiver.*

Since the Department of Labor and Workforce Development has adopted the definition of "care" verbatim from the Family Leave Act (NJAC 13:14-1.2), the additional definition of "participate in providing care" is necessary to avoid potential FLI claims for such activities as mowing the lawn, walking the dog, or doing home repairs camouflaged as "care."

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

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...

EANJ suggests replacing "Be with a child during the first 12 months..." with "Bond with a child during the first 12 months..." or perhaps "Be with a child for the purpose of bonding during the first 12 months..." The Department has provided a definition for "bonding" with a newborn child or newly adopted child. Consistent use of the defined terminology will maintain clarity.

"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.

The definition of "bonding" requires "being in one another's presence." What is the required duration for this "presence?" If an employee is on family leave to bond with a new child, and during that time they leave the child with a caregiver to take a day-trip to Atlantic City, does the person collect FLI during this trip, a day that the person would otherwise be expected to report to work?

"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.

Therefore, an individual is not eligible for FLI benefits when disabled AND collecting Temporary Disability Benefits. Is an individual eligible for FLI benefits when they have an occupational disability and they are receiving Workers' Compensation benefits? What about if an individual is disabled but they are not entitled to Temporary Disability Benefits because such benefits have been exhausted? Would they be entitled to FLI benefits?

“Child” meanswho is less than 19 years of age or 19 years of age or older but incapable of self care because of a mental or physical impairment.

The Department has chosen to adopt definitions for this provision from two separate laws, the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA); the FMLA definition for “incapable of self-care” *29 CFR 825.113 (c)* and the ADA term for “physical or mental impairment” *29 CFR 1630.2 (h)*. While we agree with the Department’s use of these two definitions, we believe it is imperative that the “physical or mental impairment” definition include the entire definition of an ADA-qualifying impairment, which would include sections (i) and (j) requiring that the physical or mental impairment “substantially limit” a major life activity.

Without a complete definition on what constitutes a physical or mental impairment, a common cold, transitory period of sadness, or tennis elbow could be covered as an “impairment”, which we do not believe is the intent of FLI.

Further, without the qualifying language that appears in 29 CFR 1630.2 (i) and (j) the intent that the adult child have a substantially limiting disability is lost and negates any differentiation between a child under or over age 19.

“Minor” means a person under the age of 18.

EANJ questions why this term is defined at all in this section. The term “minor” appears once in the statute, NJSA 43:21-42(c), and references a minor as follows:

“(c) Payment of disability benefits due minors. In case an infant or minor under the age of twenty-one years shall be entitled to receive any sum in payment for disability benefits under this chapter...”

This section clearly defines minor as being under the age of twenty-one. It is not clear why it is also being defined in these proposed regulations, and further, why the discrepancy in the two definitions.

EANJ respectfully requests that the Department clarify and/or revise its Proposed Rules issued on September 15, 2008 consistent with these comments. EANJ reserves the right to submit additional comments to the Proposed Rules issued on October 6, 2008

Respectfully submitted,
Employers Association of New Jersey

By: _____
John J. Sarno, President