

Via: Regular Mail & Fax

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

December 1, 2008

**Re: Family Leave Insurance Benefits Rule Proposals –  
Issue Date October 6, 2008 – PN 2008-324**

Dear Mr. Fish:

Thank you for the opportunity to comment on the Rule Proposals concerning Family Leave Insurance Benefits (hereinafter “FLI”). In addition to the Comments dated October 30, 2008, the Employers Association of New Jersey (EANJ) submits the following comments on behalf of its over 1,000 member organizations. For your convenience, we submit these comments following the order and numbering of the proposed regulations.

**12:17-22.6 Simultaneous unemployment and family leave insurance benefit periods**

**(a) No period of less than seven days shall be payable on a claim filed for family leave insurance benefits during unemployment under N.J.S.A. 43:21-4(f)(2).**

Limiting the benefits payable for intermittent leave to a seven day period during unemployment would have the effect of allowing an individual to collect unemployment compensation for an entire week in which he may be unavailable for work for two or three days due to his care giving responsibilities. The unemployment benefit would come from the general fund, funded by employer contributions, not the special FLI fund.

EANJ suggests all benefits paid with respect to FLI be from this special fund as provided for in PL 2008, c17: "No monies, other than the funds in the "Family Temporary Disability Leave Account", shall be used for payment of benefits during periods of family temporary disability leave..." and not from the general fund.

### **12:21-1.1 Purpose and scope, sections (c) through (e)**

We appreciate the Department's efforts in clearly expressing that FLI and the regulations promulgated thereto do not constitute a leave entitlement; but rather is solely a monetary benefit. We hope this will aid both employees and the employer community in their understanding of this new benefits law and clear up some of the confusion surrounding what this law actually provides.

### **12:21-3.7 Notice from claimant to the employer**

This section outlines the timeframes necessary for an employee to provide notice to their employer of the need to be absent for a FLI reason; however, it does not define what information the notice must contain. Without proper and complete information from an employee, the employer will not know if the employee is seeking time off because of qualifying FLI reason. Such notice is critical because it triggers an employer's responsibility to provide information (see 12:21-1.8) and lack of adequate notice could in some cases result in the employee's loss of benefits or termination for job abandonment.

For these reasons, it is imperative that any request for time off for which the employee is seeking FLI benefits be provided by the employee in writing, and include details regarding the reason and duration of the requested absence.

The absence of proper notice has sparked an abundance of litigation under the Federal Family and Medical Leave Act\*. Without a definition of "proper" notice and a requirement that it be in writing, many unnecessary disputes will arise as to whether the employer supplied information in a timely manner, as well as whether the employee gave the required notice to receive maximum benefits for a period of leave.

Notice from an employee should be in writing, on an official NJ DOL form, and contain at minimum:

- Formal request for time-off,
- Reason for the absence (bonding or care for an ill family member, relationship of the family member to the employee),

- Start and end dates of the requested absence or anticipated dates of absence if intermittent leave needed,
- The type of care to be provided,
- Any request for use of paid-time off, and
- Acknowledgement that medical certification needs to be provided to the employer to verify need to care for ill family member (as provided for in 43:21-39.2)

We note that this form of written notice is consistent with the Health Insurance Portability and Accountability Act of 1996 (see 45 CFR section 164.512) and the Genetic Information Nondiscrimination Act of 2008 (GINA) (see 42 U.S.C. 2000 ff, section 202(b)(3)). Both of these federal laws authorize an employer's receipt of medical information about an employee's family member when administering state disability and leave laws.

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*\* Andonissamy v. Hewlett-Packard Co.*, 14 WH Cases2d 328 (7th Cir. 2008); *Byrne v. Avon Prods., Inc.*, 8 WH Cases2d 1249 (7th Cir. 2003); *Stevenson v. Hyre Elec. Co.*, 12 WH Cases2d 1673 (7th Cir. 2007); *Phillips v. Quebecor World RAI, Inc.*, 11 WH Cases2d 900 (7th Cir. 2006); *de la Rama v. Illinois Dep't of Human Servs.*, 104 FEP Cases 339 (7th Cir. 2008); *Sarnowski v. Air Brooke Limousine Inc.*, 20 AD Cases 100 (3d Cir. 2007). (Although these cases deal with lack of notice pertaining to the employee's own serious health condition, the need for written FLI notice is necessary to prevent costly and time-consuming fact-sensitive litigation)

## **12:21-1.8 Notice to workers**

**(b) Each employer shall provide each employee of the employer with a written copy of the notification referred to in (a) above under each of the following circumstances:**

**...3. Whenever the employee provides notice to the employer under N.J.A.C. 12:21-3.7 or under the analogous provision within a private plan;**

EANJ suggests this language be modified to specify that notice should be provided only if there is a reasonable belief that FLI benefits will be payable. An employee may seek 4 or 5 days off to care for an ill family member and since that would not be long enough to satisfy the waiting week requirement, he would be ineligible for benefits. We believe that the employer need only provide notice for periods when it is possible to trigger FLI. This will ease an employer's administrative burden and will prevent many ineligible claims from being filed with the Division.

### **12:21-3.5 Reduction of benefits**

**(c) The employer of a claimant may require the claimant, during a period of family leave, to use up to two weeks of paid sick leave, paid vacation time or other leave at full pay.**

EANJ suggests that the Division clarify that it is permissible for an employer, under an established policy, to require an employee to use more than two weeks of paid time off, although, the total FLI benefit entitlement will only be reduced by the initial two weeks.

**(e) When the employer requires the claimant to use paid sick leave, paid vacation time or other leave at full pay under (c) above, the employer may within a reasonable and practicable time request of the State plan or the private plan, as the case may be, that the claimant's maximum family leave insurance benefits entitlement during the 12-month period be reduced by the number of days of leave at full pay required by the employer to be used by the claimant under (c) above and which has been paid by the employer to the claimant during the period of family leave.**

It is suggested that a portion of the FL-1 and FL-2 claim forms contain a section where this reduction may be requested.

### **12:21-3.9 Notice required from employers**

**(d) The employer, within two working days after receipt of the decision of eligibility, shall furnish the Division with any information known to him or her bearing upon the eligibility of the claimant or duration of payments to be made.**

**(e) If after receipt of a decision of eligibility an employer acquires information, which may render the claimant ineligible for benefits or reduce the rate or amount of benefits, such employer shall immediately forward the information to the Division.**

It is suggested that the Division supply a telephone number employers may call for reporting suspected fraud in regard to FLI recipients. Additionally, an employer should be permitted to request an impartial medical exam be performed on an employee's ill family member if the employer has valid reason to suspect that a serious health condition does not exist.

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We also respectfully submit a listing of questions/scenarios which have come up in our internal office discussions, as well as with our discussions with our membership base. EANJ suggests, to the extent possible, these items be addressed in the regulations to alleviate administrative confusion.

- Will FLI benefits be provided to an individual whose leave for a covered reason began prior to July 1, 2009? Two examples come to mind – 1) An employee begins a leave on June 15, 2009 and the leave is expected to last until August 1, 2009. Would the employee be entitled to FLI benefits for his absence from July 1, 2009 forward? If so, would a waiting week need to be served? 2) An employee gives birth in September 2008. In July 2009 she requests leave to care for the newborn, would she be entitled to FLI benefits?
- While the proposed regulations are clear that an intermittent leave can not exceed 12 months, it is not clear if there is a limitation on the number of intermittent leaves that can be taken for the same reason. For example, an employee uses 42 days of FLI benefits in one 12-month period to care for his ill mother. At the end of that period, the need for this leave continues; his mother still requires care. Is the employee eligible for another 42 days in the new 12-month period to care for that same family member with the same serious health condition?
- The proposed regulations are clear that benefits will not be payable to an individual “for any period during which the claimant performs any work for remuneration or profit”(43:21-39(15)(g)). An employee seeks time off of work and FLI benefits to care for an ill family member during the day time. Since he is relieved from his care giving responsibilities at night, he continues (or takes on) a night time job. It appears this individual would therefore be ineligible to receive FLI benefits. Is this correct?

EANJ respectfully requests that the Division clarify and/or revise its Proposed Rules issued on October 6, 2008 consistent with these comments.

Respectfully submitted,  
Employers Association of New Jersey

By: \_\_\_\_\_  
John J. Sarno, President