

55 N.J.R. 339(a)

VOLUME 55, ISSUE 5, MARCH 6, 2023

RULE PROPOSALS

Reporter

55 N.J.R. 339(a)

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Interested Persons Statement

INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF TEMPORARY DISABILITY INSURANCE

Administrative Code Citation

Proposed Readoption with Amendments: N.J.A.C. 12:21

Proposed Repeal and New Rule: N.J.A.C. 12:21-2.11

Text

Family Leave Insurance Benefits

Authorized By: Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

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

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2023-018.

Submit written comments by May 5, 2023, to:

David Fish, Executive Director
Office of Legal and Regulatory Services
PO Box 110, 13th Floor
Trenton, NJ 08625-0110
Fax: (609) 292-8246

Email: david.fish@dol.nj.gov

The agency proposal follows:

Summary

Pursuant to N.J.S.A. 52:14B-5.1.c, the rules at N.J.A.C. 12:21 were scheduled to expire on January 30, 2023. As the Department of Labor and Workforce Development (Department) submitted this notice of proposal to the Office of Administrative Law prior to that date, the expiration date was extended 180 days to July 29, 2023, pursuant to N.J.S.A. 52:14B-5.1.c(2). The chapter addresses the administration of family leave insurance (FLI) benefits, whether provided through the State plan or through a private plan. The Department has reviewed the rules at N.J.A.C. 12:21 and, with the exception of proposed amendments throughout the chapter to implement changes to the FLI program resulting from P.L. 2018, c. 128; P.L. 2019, c. 37; P.L. 2020, c. 17; and P.L. 2020, c. 23, the Department has determined them to be necessary, reasonable, and proper for the purposes for which they were originally promulgated. Accordingly, the Department proposes that N.J.A.C. 12:21 be readopted, with the proposed amendments described below.

A summary of the subchapters at N.J.A.C. 12:21 follows:

Subchapter 1 contains general provisions that apply to both the State plan and private plans.

Subchapter 2 addresses the Department's administration of private plans.

Subchapter 3 addresses the Department's administration of the State plan.

The Department proposes several amendments at N.J.A.C. 12:21-1.2, which contains definitions of words and terms throughout the chapter.

The Department proposes to amend the definitions of the terms "Act" and "'benefits' or 'family temporary disability benefits' or 'family leave insurance benefits'" so as not to explicitly list all of the qualifying reasons that an individual may receive FLI benefits, and instead provide that payment of benefits are made because of "one or more of the qualifying reasons set forth at N.J.S.A. 43:21-27(o)," which lists all of the qualifying reasons (and is also reflected in the Department's proposed amendment to the definition of "'family leave' or 'family temporary disability leave'").

The Department proposes to replace the definition of the term "base year" to ensure consistency with P.L. 2019, c. 37. Pursuant to that legislation, "base year" is now defined as "the first four of the last five completed calendar quarters immediately preceding the period of family leave, except that, if the individual does not have sufficient qualifying weeks or wages in the individual's base year to qualify for benefits, the individual shall have the option of

designating that the individual's base year shall be the 'alternate base year.' 'Alternate base year' means the last four completed calendar quarters immediately preceding the period of family leave, except that if the individual also does not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding the period of family leave, 'alternate base year' means the last three completed calendar quarters immediately preceding the individual's benefit year and, of the calendar quarter in which the period of family leave commences, the portion of the quarter which occurs before the commencing of the period of family leave."

The Department proposes to amend the definition of the term "child" to ensure consistency with P.L. 2019, c. 37. Pursuant to that legislation, the definition of "child" no longer includes the requirement that the individual be "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." Furthermore, the legislation expands the definition of "child" to include "a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier."

The Department proposes to amend the definition of the term "family member" to ensure consistency with P.L. 2019, c. 37. Pursuant to that legislation, the definition of "family member" is expanded to include a sibling, grandparent, grandchild, parent-in-law, any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship.

The Department proposes to amend the definitions of the terms "family leave" or "family temporary disability leave," "bond" or "bonding," and "care recipient," to ensure consistency with P.L. 2019, c. 37, P.L. 2020, c. 17, and P.L. 2020, c. 23. Pursuant to the 2019 legislation, permitted uses of family temporary disability leave now include a parent bonding with a newly placed foster child or a child pursuant to a valid gestational carrier [page=340] agreement, and to engage in activities for which unpaid leave may be taken pursuant to section 3 of the New Jersey Security and Financial Empowerment Act, P.L. 2013, c. 82. Pursuant to the 2020 legislation, passed in response to the COVID-19 pandemic, permitted uses of family temporary disability leave were expanded to include providing in-home care or treatment of a family member, under certain conditions, during a state of emergency or similar public health crisis.

The Department proposes to replace the definition of "health care provider" to ensure consistency with statutory changes. The existing definition references the definition of "health care provider" in the New Jersey Family Leave Act and the implementing regulations adopted by the Division on Civil Rights (DCR). The amended definition would adopt the DCR definition.

The Department proposes to amend the definition of "parent of a covered individual" to ensure consistency with P.L. 2019, c. 37. Pursuant to that legislation, the definition of "parent of a covered individual" is expanded to include an individual who became the parent of a child pursuant to a valid gestational carrier agreement.

The Department proposes to delete the definition of "waiting period," as P.L. 2019, c. 37 eliminated the one-week waiting period before FLI benefits are payable.

The Department proposes an amendment at N.J.A.C. 12:21-1.8, which outlines the requisite notice that must be given to workers. The Department proposes to add a requirement that notice of the benefits of a private family leave insurance plan must be furnished to covered employees by the employer through a conspicuous and continuing posting at the place of employment, and by personal notice to each employee at the time of the establishment of the private plan, at any subsequent time of hire, and within three business days of when the employer knows or should know that the employee may have a need for FLI benefits. This notice matches the notice requirement imposed on private temporary disability plans at P.L. 2019, c. 37. The notice must contain current rates, eligibility requirements, benefit entitlements, contact information for the private plan, instructions on how to file for benefits, and appeal rights. The proposed amendments would also permit this notice to be furnished to affected employees through electronic means.

With respect to Subchapter 2, which addresses the Department's administration of private plans, the Department proposes to repeal and replace N.J.A.C. 12:21-2.11, and proposes amendments at N.J.A.C. 12:21-2.12, regarding employee consent for adoption by the employer of a contributory private plan for FLI coverage.

With respect to N.J.A.C. 12:21-2.11, the Department proposes to amend the existing election procedures to mirror the election procedures established for private temporary disability plans at P.L. 2019, c. 37. Currently, the rule states that if employees are required to contribute to the cost of a private FLI plan, a majority of the employees covered by the private plan must agree by election (written ballot or other manner prescribed by the Division of Temporary Disability Insurance) to the establishment of the plan. Section 10 at P.L. 2019, c. 37, amended the Temporary Disability Benefits Law, so as to distinguish between employees covered by a collective bargaining agreement and those not covered. Pursuant to that legislation, if employees covered by a labor agreement are required to contribute to the costs of benefits under a private temporary disability plan, a majority of the affected employees must agree to the plan by written election (unless the labor agreement expressly waives this right). For employees not covered by a labor agreement, P.L. 2019, c. 37, provides that "no employee consent or written election is required for withdrawal from the State plan or establishment of a private plan."

The Department also proposes an amendment at N.J.A.C. 12:21-2.12, which would make clear that this section, which contains requirements relating to evidence of employee consent to the establishment of a private FLI plan, only applies where employee consent is mandated pursuant to the proposed amendment at N.J.A.C. 12:21-2.11 (described in detail above).

The Department proposes two amendments at N.J.A.C. 12:21-2.27. The first is to mirror the revisions to the definition of "average weekly wage" and "base year" in the 2019 legislation with respect to private temporary disability plans. That legislation changed the method for calculating the "average weekly wage" so that, whereas it had stated that the average weekly wage was the amount derived by dividing a covered individual's total wages earned from the individual's most recent covered employer during the base weeks "in the eight calendar weeks" immediately preceding the calendar week in which a period of disability commenced, by the number of such base weeks, the "average weekly wage" is now the amount derived by dividing a covered individual's total wages earned from the individual's most recent covered employer during the base weeks "in the base year" immediately preceding the calendar week in which a period of disability commenced, or in which the individual submits a claim for benefits, pursuant to N.J.S.A. 43:21-39.1(h), by the number of base weeks.

The Department also proposes to amend N.J.A.C. 12:21-2.27(e), which states that the "maximum total benefits payable to any eligible employee may be computed as an amount equal to six times the weekly benefit rate or 1/3 of his or her total wages in his or her base year, whichever is lesser ..." Pursuant to P.L. 2019, c. 37, the maximum total FLI benefits payable to a claimant is 12 times the claimant's weekly benefit amount, and not 1/3 of total wages in the base year.

With respect to Subchapter 3, concerning the Department's administration of the State plan, the Department proposes amendments at N.J.A.C. 12:21-3.2, 3.3, and 3.9. These proposed amendments, pursuant to P.L. 2018, c. 128, allow an individual who knows in advance when an anticipated period of family leave will commence (for such circumstances as bonding with a child), to notify the employer of the anticipated leave period and submit a claim to the Division for benefits not more than 60 days prior to the date on which the period of family leave will commence. The proposed amendments detail the Department's obligation to process FLI claims filed in advance, as well as the employer's obligation to submit necessary documents to the Department to determine eligibility for benefits.

The Department proposes to delete N.J.A.C. 12:21-3.5(c), (e), and (f) that permit an employer to require an FLI claimant to use up to two weeks of paid leave during a period of a family leave. Pursuant to P.L. 2019, c. 37, an employer can no longer require this.

The Department proposes an amendment at N.J.A.C. 12:21-3.6, which, pursuant to P.L. 2019, c. 37, clarifies that an individual working for more than one employer can claim benefits for leave taken from one employer, based on wages paid by that employer, while continuing to work for the other employer(s), on the condition that he or she

does not increase the amount of employment time with any other employer during the period for which FLI benefits are paid.

Finally, the Department proposes amendments at N.J.A.C. 12:21-3.10, which pursuant to P.L. 2019, c. 37, remove restrictions regarding intermittent use of family temporary disability leave, including intermittent leave for the purpose of engaging in activities for which unpaid leave may be taken pursuant to the New Jersey Security and Financial Empowerment Act, if the individual is a victim of domestic violence or a sexually violent offense and clarifies an individual's obligation to provide notice to his or her employer of the need for intermittent family temporary disability leave. Proposed amendments allow the Division of Temporary Disability Insurance to require a person seeking intermittent family leave to submit a certification meeting the standards at P.L. 2013, c. 82.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption with amendments, a repeal, and a new rule continue the family leave insurance benefits program, which extends the temporary disability benefits program, so as to provide monetary benefits that protect the covered individual from wage loss suffered because of the need to provide care for a family member with a serious health condition (including conditions related to a possible outbreak of a communicable disease), bond with a newborn or newly adopted or fostered child, or recover from an incident of domestic or sexual violence. Since the program's inception it has had a significant and positive social impact. The rules proposed for readoption with amendments, a repeal, and a new rule would expand the scope of the [page=341] program as well as the generosity of its benefits in accordance with recent amendments to the Temporary Disability Benefits Law.

The vast majority of what is contained within the proposed amendments is expressly mandated by P.L. 2018, c. 128, P.L. 2019, c. 37, P.L. 2020, c. 17, and P.L. 2020, c. 23. Therefore, whatever social impact might be felt, positive or negative, by the citizens of the State, including business owners, would derive in the first instance from these laws and not from the rules proposed for readoption with amendments, a repeal, and a new rule. Those laws and the resulting changes to Departmental rules permit foster parents and parents of a child born through an agreement with a gestational carrier to receive benefits while bonding with their child. They would also permit the payment of benefits while caring for the serious health condition of a much wider array of individuals, and permit victims of domestic or sexual violence to receive benefits under certain related circumstances. Absent these changes to the law and resulting amendments to departmental rules, individuals would face these challenges without financial support afforded by FLI benefits. The overall effect on society is salutary, as more individuals receive more material support to deal with important life challenges.

The rules proposed for readoption with amendments, a repeal, and a new rule would also reduce the administrative burden on employers. Specifically, some of the proposed amendments would permit employers with a private FLI plan to meet posting and notice requirements electronically, rather than the traditional approach of posting notices in a break room and individual personal service. Additionally, the proposed amendments would make it easier for employers to withdraw from the State plan or establish a private plan, so long as the affected employees are not covered by a labor agreement.

Economic Impact

The rules proposed for readoption with amendments, a repeal, and a new rule would have a positive economic impact by permitting workers to receive benefits, and thereby maintain their standard of living and purchasing power, while responding to difficult life events. The program's cost to employers is modest, as FLI benefits are funded entirely by employee payroll deductions. The principal cost to employers is that incurred in keeping employee records and providing relevant information to the Department. The latter are directed by statute, from which the Department has no discretion to deviate.

Federal Standards Statement

The rules proposed for readoption with amendments, a repeal, and a new rule are governed by the Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

Jobs Impact

The rules proposed for readoption with amendments would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The rules proposed for readoption with amendments, a repeal, and a new rule should have no impact on the agriculture industry. That is, the rules proposed for readoption with amendments, a repeal, and a new rule, pertain exclusively to the payment of a monetary benefit to employees, not to any leave entitlement. Furthermore, the vast majority of the proposed amendments are expressly mandated by P.L. 2018, c. 128, P.L. 2019, c. 37, P.L. 2020, c. 17, and P.L. 2020, c. 23, from which the Department has no discretion to deviate.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments, a repeal, and a new rule do not impose any additional reporting, recordkeeping, or other compliance requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The reporting requirements delineated throughout this chapter currently exist and are imposed on all participating employers, regardless of size. The rules proposed for readoption with amendments, a repeal, and a new rule require employers to keep employee records and to provide certain employee information to the Department and claimants concerning FLI benefits. Employers, including small businesses, may incur costs associated with keeping and providing the required reports and information. However, these requirements are necessary in order to ensure that employees can receive FLI benefits, if needed. Employers will not require outside professional services to comply with the rules proposed for readoption with amendments, a repeal, and a new rule.

As described above, some of the Department's proposed amendments would also reduce the administrative burden on employers, including small employers, by permitting those with a private FLI plan to meet posting and notice requirements electronically, and by making it easier for employers to withdraw from the State plan or establish a private plan, so long as the affected employees are not covered by a labor agreement.

Housing Affordability Impact Analysis

It is not anticipated that the rules proposed for readoption with amendments, a repeal, and a new rule will evoke a change in the average costs associated with housing or on the affordability of housing. The basis for this finding is that the rules proposed for readoption with amendments, a repeal, and a new rule pertain to the payment of FLI benefits and have nothing to do with housing.

Smart Growth Development Impact Analysis

It is not anticipated that the rules proposed for readoption with amendments, a repeal, and a new rule would evoke a change in the housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed rules for readoption with amendments, a repeal, and a new rule do not pertain to housing production in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it would not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12:21.

Full text of the proposed amendments, repeal, and new rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL PROVISIONS

12:21-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Act" means the Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., as amended by P.L. 2008, c. 17, which extends the temporary disability benefits program, so as to provide to covered individuals family leave benefits, a monetary benefit (not a leave entitlement), [which protects the covered individual against wage loss suffered because of the need of the covered individual to participate in providing care for a family member who has a serious health condition or to be with a newborn or adopted child] **for one or more of the qualifying reasons as set forth at N.J.S.A. 43:21-27(o).**

"Base year" with respect to a period of family leave means the [52-consecutive-calendar weeks immediately preceding the calendar week in which the period of family leave commenced, except that with respect to a period of family leave for an individual who has a period of family leave immediately after the individual has a period of disability for the individual's own disability, the period of family leave is deemed, for the purpose of specifying the time of the 52-week period in which base weeks or earnings are required to be established for family leave benefit eligibility to have commenced at the beginning of the period of disability for the individual's own disability, not the period of family leave] **first four of the last five completed calendar quarters immediately preceding the period of family leave, except that, if the individual does not have sufficient qualifying weeks or wages in the individual's base year to qualify for benefits, the individual shall have the option of designating that the individual's base year shall be the "alternate base year," which means the last four completed calendar quarters immediately preceding the period of family leave; and except that if [page=342] the individual also does not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding the period of family leave, "alternate base year" means the last three completed calendar quarters immediately preceding the individual's benefit year and, of the calendar quarter in which the period of disability commences, the portion of the quarter which occurs before the commencing of the period of family leave.** "Disability" for the purpose of determining the base year with respect to a period of family leave for an individual who has a period of family leave immediately after the individual has a period of disability for the individual's own disability, means where an individual suffers any accident or sickness resulting in the individual's total inability to perform the duties of employment. For the purpose of defining the term "base year," the date on which a period of family leave commences is synonymous with the first day on which the individual establishes a claim for family leave insurance benefits.

"Benefits" or "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 who has a serious health condition or to bond with a newborn or newly adopted child] **one or more of the qualifying reasons as set forth at N.J.S.A. 43:21-27(o).**

"Bond" or "bonding" with a newborn child or newly adopted **or fostered** child, **including a child who becomes the child of a parent pursuant to a valid written agreement between the parents and a gestational carrier,** means to develop a psychological and emotional attachment between a child and his or her primary care giver(s). The development of this attachment or bond between child and care giver(s) requires being in one another's presence.

...

"Care recipient" means the family member who is receiving care for a serious health condition or the newborn child or newly adopted **or fostered child, including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier**, with whom the "care giver" is bonding.

"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] **including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier.**

[As used in this definition, "incapable of self-care" 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.

As used in this definition, "mental or physical impairment" 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.]

...

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

- 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;**
- 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 is a parent of the child pursuant to a valid gestational carrier agreement, or the first 12 months after the placement of the child for adoption or as a foster child with the individual;**
- 3. Engage in activities for which unpaid leave may be taken pursuant to N.J.S.A. 34:11C-3 of the New Jersey Security and Financial Empowerment Act, on the individual's own behalf, if the individual is a victim of an incident of domestic violence, a sexually violent offense, or to assist a family member of the individual who has been a victim of an incident of domestic violence, provided that any time taken by an individual who has been a victim of an incident of domestic violence, or a sexually violent offense for which the individual receives benefits for a disability caused by the violence or offense shall be regarded as a period of disability of the individual and not as a period of family leave; or**
- 4. In the event of a state of emergency declared by the Governor, or when indicated to be needed by the Commissioner of the New Jersey Department of Health (Commissioner) or other public health authority, an epidemic of a communicable disease, a known or suspected exposure to the communicable disease, or efforts to prevent spread of the communicable disease, provided in-home care or treatment of the family member of the employee is required due to:**

i. The issuance by a healthcare provider or the Commissioner or other public health authority of a determination that the presence in the community of the family member may jeopardize the health of others; and

ii. The recommendation, direction, or order of the provider or authority that the family member be isolated or quarantined as a result of suspected exposure to a communicable disease.

"Family leave" does not include any period of time during which a covered individual is paid temporary disability benefits pursuant to the New Jersey Temporary Benefits Law, N.J.S.A. 43:21-25 et seq., 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 **sibling, grandparent, grandchild**, child, spouse, domestic partner, civil union partner, **parent-in-law**, or parent of a covered individual, **or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee, which is the equivalent of a family relationship.**

...

["Health care provider" means any person licensed under Federal, state or local law, or the laws of a foreign nation, to provide health care services; or any other person who has been authorized to provide health care by a licensed health care provider.]

"Health care provider" means a duly licensed health care provider or any other health care provider deemed appropriate by the Director of the Division on Civil Rights, including, but not limited to, any person licensed under Federal, state, or local law, or the laws of a foreign nation, to provide health care services.

...

"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, **or who became the parent of a child pursuant to a valid written agreement between the parent and a gestational carrier.**

...

["Waiting period" means the first seven consecutive days of a first claim or of a reestablished claim, during either of which no family leave [page=343] insurance benefits shall be payable to any individual under the State plan, except that:

1. If benefits shall be payable for three consecutive weeks with respect to any period of family leave, then benefits shall also be payable with respect to the first seven days thereof;

2. In the case of intermittent family leave, in a single period of family leave taken to provide care for a family member of the individual with a serious health condition, 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; and

3. In the case of an individual taking family leave immediately after the individual has a period of disability for the individual's own disability, there shall be no waiting period between the period of the individual's own disability and the period of family leave.]

(a)-(d) (No change)

(e) Notice, in a form approved by the Director, of the benefits provided by a private family leave insurance plan shall be furnished to the covered employees by the employer by a conspicuous posting at the place of employment, and by personal notice to each employee at the time of the establishment of the private plan, at any subsequent time of hire, and within three business days of when the employer knows or should know that the employee may have a need for disability benefits.

(f) The notice at (e) above shall reflect current rates, eligibility requirements, benefit entitlements, and rights of the employees under a private family leave insurance plan pursuant to the Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., including appeal rights, and shall include contact information for the private plan and instructions as to how to file for benefits with the private plan.

(g) In the event that an employer has an internet site or intranet site for exclusive use by its employees and to which all employees have access, posting of the notice at (e) above on the employer's internet or intranet site shall satisfy the conspicuous posting requirement.

(h) Providing the notice at (e) above to an employee through email shall satisfy the requirement at (e) above, that the employer provide each employee personal notice at the time of the establishment of the private plan, at any subsequent time of hire, and within three business days of when the employer knows or should know that the employee may have a need for disability benefits.

SUBCHAPTER 2. PRIVATE PLANS

[12:21-2.11 Employee consent

If employees are required to contribute to the cost of a private plan, the employer shall submit, in writing, to the employees a brief summary of the provisions of the plan, including the weekly benefit rate, the maximum amount and duration of benefits and the contributions required from the employees with respect to the benefits to be provided thereby. A majority of the employees to be covered must agree by election (by written ballot or other manner prescribed by the Director) to the establishment of the plan, which shall include the worker's contribution required. Evidence of their consent shall be shown on the application for approval.]

12:21-2.11 Employee consent

(a) If employees who are subject to the provisions of a collective bargaining agreement are required to contribute toward the cost of benefits under a private plan, such plan shall not become effective, unless prior to the effective date, a majority of the employees in the class or classes to be covered by the private plan have agreed to the private plan by written election, unless the collective bargaining agreement expressly waives the employees' right to a majority election as a condition for the private plan.

(b) In the case of employees not subject to a collective bargaining agreement, no employee consent or written election is required for the withdrawal from the State plan or the establishment of a private plan.

(c) Written elections held pursuant to this section may be conducted by electronic communications evidenced by the electronic signature of the employee, as the term electronic signature is defined at N.J.S.A. 12A:12-2, but shall not be conducted in a manner inconsistent with any applicable terms of a collective bargaining agreement.

12:21-2.12 Evidence of consent

(a) [There] Where employee consent is required pursuant to N.J.A.C. 12:21-2.11, there shall be submitted on the application for approval a statement showing the total number of eligible employees in employment by the employer and the number of employees who agreed to the plan, together with the individual ballots or documents verifying the employees' consent. The ballots or documents of consent, after review by the Division, shall be returned to the employer.

(b) (No change.)

12:21-2.27 Exchange of information

(a) (No change)

(b) If such recomputed weekly benefit amount is less than the maximum weekly benefit amount payable under the State plan and the computation of the "average weekly wage" for such recomputation yields a result, which is less than the individual's average weekly earnings in employment with all covered employers during the base weeks in such [eight calendar weeks] **base year**, then the insurer, which has undertaken to pay the benefits provided by the plan shall request the Division to provide such payer with a statement of the weekly wages of the employee earned from all covered employers during the [eight] base weeks **in the year** immediately preceding the calendar week in which the employee's family leave commenced, **or immediately preceding the calendar week in which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h).**

(c) When requesting such information, such payer shall furnish the Division with the following information:

1. (No change)

2. The date on which the family leave commenced, **or date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h);**

3. The names and addresses of such other employers, from whom the employee alleges to have earned wages immediately preceding his or her family leave, **or immediately preceding the date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h),** as may be necessary to determine all wages earned in the required [eight] base weeks **in the base year;** and

4. The weekly earnings of the employee from the employer during each of the calendar weeks in the [52 calendar weeks] **base year** immediately preceding the family leave, **or immediately preceding the date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h),** if any.

(d) If the private plan of an employer provides, as a condition of eligibility for benefits with respect to a period of family leave, that an otherwise eligible employee shall have established at least 20 or a lesser number of base weeks within the [52 calendar weeks] **base year** preceding the week in which his or her period of family leave commenced, **or immediately preceding the date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h),** and the employee has not established such base weeks from his or her employment with the employer, then the insurer, which has undertaken to pay the benefits provided by the plan shall request the Division to provide such payer with a statement of the number of base weeks in the employee's base year. When requesting such information, such payer shall furnish the Division with the following information:

1. (No change.)

2. The date on which the family leave commenced, **or date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h);**

3. The names and addresses of such other employers, from whom the employee alleges to have earned wages in the [52 calendar weeks] **base year** immediately preceding his or her family leave, **or immediately preceding the date on which the employee submitted a claim for [page=344] benefits consistent with N.J.S.A. 43:21-39.1(h),** as may be necessary to determine the required number of base weeks; and

4. The number of calendar weeks in the [52 calendar weeks] **base year** immediately preceding the calendar week in which the period of family leave commenced, **or immediately preceding the date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h),** during which the employee earned not less than the minimum base week requirement as defined [in] **at N.J.S.A. 43:21-27(i)(4)** from the employer.

(e) If the private plan of an employer provides, with respect to periods of family leave commencing on or after July 1, 2009, that the maximum total benefits payable to any eligible employee may be computed as an amount equal to [six] **12** times the weekly benefit rate [or 1/3 of his or her total wages in his or her base year, whichever is lesser], where it appears that such provision will be applicable with respect to any period of family leave and where the insurer does not have sufficient information regarding wages earned with prior employers in the base year, then the insurer shall request the Division to provide a statement of the total wages in the employee's base year. When requesting such information, such insurer shall furnish the Division with the following information:

1. (No change.)
2. The date on which the family leave commenced, **or date on which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h)**;
3. Names and addresses of other employers in the [52 weeks] **base year** prior to the week in which the family leave [occurred] **commenced, or the week in which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h)**;
4. (No change.)

SUBCHAPTER 3. STATE PLAN

12:21-3.2 Notice and proof of family leave

(a) Within 30 days after the commencement of a period of family leave, a written notice of family leave, on which a claim for State plan benefits is based, shall be furnished to the Division by the claimant. The notice need not be on any prescribed form but shall state the claimant's full name, address, and valid Social Security Number, as well as the date on which claimant begins the period of family leave. The filing of Form FL-1 (Proof and claim for family leave insurance benefits) or Form FL-2 (Proof and claim for family leave insurance benefits for bonding immediately following a State plan claim for pregnancy disability) shall constitute notice of family leave.

1. If an individual knows in advance when an anticipated period of family leave will commence, the individual may notify the employer of the anticipated period of family leave and submit to the Division a claim for benefits for that period, which shall include a statement of when the leave will commence and any certification requested by the Division, prior to, but not more than 60 days prior to, the date on which the period of family leave will commence.

2. The Division shall process the claim at (a)1 above immediately and, upon a finding that the claim is valid, shall pay the benefit upon the commencement of the period of family leave, except that if the Division receives the claim less than 30 days before the commencement of the period of family leave, the Division shall make the payment not more than 30 days after the receipt of the claim.

3. The periods of family leave to which the provisions at (a)1 and 2 above apply shall include, but not be limited to, any of the following if the commencement date of the period of leave is known in advance:

i. Periods of leave for care of a child of the individual after adoption or childbirth (including childbirth under a valid gestational carrier agreement);

ii. The placement of a child into foster care with the individual;

iii. Periods of leave for scheduled medical procedures, treatments, or appointments for a family member of the individual; and

iv. Periods of leave for scheduled ongoing care of a family member of the individual.

(b)-(f) (No change.)

12:21-3.3 Filing of claims for benefits

(a)-(b) (No change.)

(c) If an individual knows in advance when his or her period of family leave will commence, he or she may notify his or her employer of the anticipated period of leave and file a claim with the Division for that period. Such claim cannot be submitted earlier than 60 days prior to the commencement of the leave.

(d) The filing of claims in advance of the anticipated period of family leave shall include, but not be limited to, the following types of family temporary disability leave, if the commencement date of the leave is known in advance:

- 1. Periods of leave to care for a child of the individual after adoption or childbirth, including childbirth under a valid gestational carrier agreement and the placement of a child into foster care with the individual;**
- 2. Periods of leave for scheduled medical procedures, treatments, or appointments for a family member of the individual; and**
- 3. Periods of leave for scheduled ongoing care of a family member of the individual.**

(e) The Division shall process a claim filed in advance of the anticipated period of family leave immediately and, upon finding that the claim is valid, shall pay the benefits upon the commencement of the period of leave, except that if the Division receives such claim less than 30 days before the commencement of leave it shall pay the benefits not more than 30 days after receipt of the claim.

12:21-3.5 Reduction of benefits

(a)-(b) (No change.)

[(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.]

[(d)] **(c)** (No change in text.)

[(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.

(f) Where the employer requests a reduction of maximum family leave insurance benefits entitlement under (e) above, the State plan or private plan, as the case may be, shall reduce the claimant's maximum family leave insurance benefits entitlement during the 12-month period by the number of days of leave at full pay paid by the employer to the claimant during the period of family leave. This reduction in the maximum family leave insurance benefits entitlement during the 12-month period in number of days will result in a corresponding reduction, relative to the instant claim and any subsequent claims filed during the 12-month period, in the monetary amount of family leave insurance benefits, which reduction will be directly attributable to the above-mentioned reduction in the maximum family leave insurance benefit entitlement.]

Recodify existing (g)-(j) as **(d)-(g)** (No change in text.)

12:21-3.6 Concurrent coverage and multiple employers

(a)-(c) (No change.)

(d) For FLI claims made on or after July 1, 2020, in which the covered individual has more than one employer, the individual shall have the option of claiming benefits for leave taken from one employer, based on wages paid by that employer, on the condition that the individual does not, during the period for which the benefits are paid, increase the amount of employment time with any other employer.

12:21-3.9 Notice required from employers

(a)-(e) (No change)

(f) The employer shall, within nine days from the beginning of an employee's FLI leave, or after the employee notifies the employer of an anticipated period of FLI leave, whichever comes first, furnish the Division (with a copy to the claimant) with any requested information to establish the eligibility of the claimant, including the claimant's:

1. Name;

2. Address;

[page=345] **3. Social Security number;**

4. Such wage information as the Division requires to determine eligibility for benefits, including sick pay, vacation, or other paid time off provided by the employer during the period of FLI leave; and

5. The name, address, and Division identity number of the employer.

12:21-3.10 Intermittent leave

(a) A covered individual shall [not] be eligible for family leave insurance benefits where the covered individual seeks to take intermittent family leave for the purpose of bonding with a newborn or newly adopted child, [except that where both the covered individual and the employer agree that the covered individual will be permitted to take family leave for the purpose of bonding with a newborn or newly adopted child in non-consecutive periods of seven days or more, family leave insurance benefits shall be payable for those periods of family leave] **including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier, or placement of a child in foster care.**

1. Prior to taking the leave, an employee shall provide the employer with prior notice not less than 15 days before the first day on which benefits are paid for the intermittent leave, unless an emergency or other unforeseen circumstance precludes prior notice; and the covered individual makes a reasonable effort to schedule the leave, so as not to unduly disrupt the employer's operations; and, if possible, prior to the commencement of the leave, provides the employer with a regular schedule of the requested leave.

(b)-(c) (No change.)

(d) A covered individual shall be eligible for FLI benefits where the covered individual seeks to take intermittent family leave for the purpose of engaging in activities for which unpaid leave may be taken pursuant to section 3 of the New Jersey Security and Financial Empowerment Act, P.L. 2013, c. 82 (codified at N.J.S.A. 34:11C-3), on the individual's own behalf, if the individual is a victim of an incident of domestic violence or a sexually violent offense, or to assist a family member of the individual who has been a victim of an incident of domestic violence or a sexually violent offense.

1. Prior to taking the leave, an employee shall, if the necessity for the leave is foreseeable, and unless an emergency or other unforeseen circumstances precludes prior notice, provide the employer as far in advance as is reasonable and practical, with written notice of the need for the leave.

(e) If a covered individual seeks to take intermittent family leave for the purpose described at (d) above, the Division may require the individual to submit a certification that meets the standards specified by

subsection c. of section 3 at P.L. 2013, c. 82 (N.J.S.A. 34:11C-3), whether or not the individual's employer has requested such documentation.

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