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RULE ADOPTIONS

LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF TEMPORARY DISABILITY INSURANCE
DIVISION OF UNEMPLOYMENT INSURANCE

41 N.J.R. 1052(c)

Adopted Amendments: *N.J.A.C. 12:15-1.1, 1.2, 1.6* and *2.3*

Adopted New Rules: N.J.A.C. 12:15-1.1A, 12:17-22 and 12:21

Family Leave Insurance Benefits

Proposed: October 6, 2008 at *40 N.J.R. 5509(a)*.

Adopted: February 3, 2009 by David J. Socolow, Commissioner, Department of Labor and Workforce Development.

Filed: February 4, 2009 as R.2009 d.82, **with substantive and technical changes** not requiring additional public notice or comment (see *N.J.A.C. 1:30-4.3*).

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

Effective Date: March 2, 2009.

[page=1053] Expiration Dates: November 28, 2010, *N.J.A.C. 12:15*;

December 10, 2013, *N.J.A.C. 12:17*; and

March 2, 2014, *N.J.A.C. 12:21*.

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

A public hearing regarding the proposed amendments and new rules was held on November 3, 2008 at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony regarding the proposed amendments and new rules. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, the hearing officer recommended that the Department proceed with the amendments and new rules with substantive changes not requiring additional public notice or comment. Those changes are discussed in detail below. The record of the public hearing may be reviewed by contacting David Fish, Regulatory Officer, Office of Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals:

1. John D. Rogers, Vice President, Human Resource Issues, New Jersey Business and Industry Association, Trenton, New Jersey.

2. John J. Sarno, President, Employers Association of New Jersey, Livingston, New Jersey.

3. Kathy Warren, President, New Jersey Staffing Alliance, Kinnelon, New Jersey.

4. Leah J. Walters, Legislative Director--Midatlantic Region, American Council of Life Insurers, Washington, D.C.

5. Deborah A. Wean, Esq., CPCU, Assistant Secretary, NJM Insurance Group, Trenton, New Jersey.

6. Kathleen A. Davis, Executive Vice President and COO, Chamber of Commerce--Southern New Jersey, Voorhees, New Jersey.

7. Michael Flynn, Government Relations Division, New Jersey Education Association, Trenton, New Jersey.

8. Charles Wowkanech, President and Laurel Brennan, Secretary-Treasurer, New Jersey State AFL-CIO, Trenton, New Jersey.

9. Karen S. White, Director, Working Families Program, Center for Women and Work, Rutgers, The State University of New Jersey, on behalf of the NJ Time to Care Coalition.

10. Atif Malik, Organizer, New Jersey Citizen Action, Newark, New Jersey.

11. Lauren Agoratus, M.A.--parent, NJ Coordinator, Family Voices at the Statewide Parent Advocacy Network, NJ Caregiver Community Action Network--National Family Caregivers (volunteer), Newark, New Jersey.

12. Chris Mulford, RN, IBCLC, Representative to NJ Time to Care Coalition, New Jersey Breastfeeding Task Force (No address provided).

13. Yolanda Yablonkai, Milltown, New Jersey.

14. Bradley H. Kline, D.O., South Brunswick, New Jersey.

15. Harriet Bernstein, President, Califon Consultants of New Jersey, LLC, Ocean Grove, New Jersey.

16. Patrice Lewis, Vice President, On Time Transport, Inc., Roselle, New Jersey.

17. Barbara Sachau, Florham Park, New Jersey.

18. Kristen Mateo, Vice President and Assistant General Counsel, Legal Services of New Jersey, Edison, New Jersey.

COMMENT: Mr. Rogers expresses concern that the proposed amendments and new rules "will not become final until after the Family Leave Insurance law has taken effect." He states specifically with regard to the collection and remittance of the "new family leave insurance payroll tax to be paid by employees," that "despite sending a mailing regarding the notice requirement of the law to all employers, the Department declined to include information regarding the collection and remittance of the payroll tax." Mr. Rogers adds, "[n]ot including this information in the proposed regulations has placed a tremendous burden on many businesses that must scramble to alter their payroll functions in order to be in compliance by January 1, 2009."

RESPONSE: Mr. Rogers submitted a virtually identical comment in response to the notice of proposal published in the September 15, 2008 issue of the New Jersey Register, concerning proposed amendments and new rules within *N.J.A.C. 12:16* (contributions, records and reports). The September 15, 2008 notice of proposal was the first of two such notices intended to implement P.L. 2008, c. 17, the law, which establishes the family leave insurance benefits program. In the January 5, 2009 notice of adoption relative to the *N.J.A.C. 12:16* amendments and new rules (*41 N.J.R. 258(a)*), the Department explained in great detail the various notices, which had been either posted on the Department's website or mailed directly to all affected employers throughout the State. As explained in the January 5, 2009 notice of adoption, those notices addressed not only the law's notice requirements, but also the collection and remittance of family leave insurance benefits contributions on behalf of workers or what Mr. Rogers refers to as the "new family leave insur-

ance payroll tax to be paid by employees." Consequently, as indicated in the January 5, 2009 notice of adoption, Mr. Rogers' assertion that the Department "declined to include [within the written and website-based notices to employers] information regarding the collection and remittance of the payroll tax," is simply not accurate.

With regard to Mr. Rogers' assertion that provisions relating to the collection and remittance of family leave insurance benefits contributions should be included within "the regulations," existing N.J.A.C. 12:16-9, entitled, "Contributions By Workers," addresses the reporting and payment of contributions to the State Disability Benefits Fund, of which the Family Temporary Disability Leave Account is a part. Where existing rules need not be amended in order to address the family leave insurance benefits program (a part of the temporary disability insurance (TDI) benefits program by virtue of its establishment within the Temporary Disability Benefits Law, *N.J.S.A. 43:21-25* et seq.), the Department did not propose amendments to those existing rules. The existing rules, which address the collection and payment of contributions to the State Disability Benefits Fund, coupled with the clear and unambiguous provisions within P.L. 2008, c. 17, section 15 (*N.J.S.A. 43:21-7(d)(1)(G)(ii)*), regarding the amounts to be contributed by employees to the State Disability Benefits Fund for family leave insurance benefits coverage, obviate the need for any amendments to the Department's rules in order to address the issues of collection and payment of contributions. As indicated in the January 5, 2009 notice of adoption, these rules regarding the collection and payment of worker contributions to the State Disability Benefits Fund have existed for many years without any apparent confusion on the part of the employer community.

COMMENT: Mr. Rogers takes issue with a "Frequently Asked Question" (FAQ) and response posted on the Department's website. According to Mr. Rogers, "[t]he proposed regulations do not discuss this issue . . ."

RESPONSE: Because, by Mr. Rogers' own account, his comment does not concern any amendment or new rule contained within a notice of proposal published by the Department, the Department declines to address his comment within the context of this notice of adoption.

COMMENT: Mr. Rogers states that proposed N.J.A.C. 12:15-1.1A, 12:17-22.1 and 12:21-1.2 all "define 'mental or physical impairment' within the definition of 'child,' in a manner that is inconsistent with the definition found within the Federal Family and Medical Leave Act (FMLA)." He suggests that the proposed definition of "mental or physical impairment" should be identical to the definition found within the FMLA.

RESPONSE: The definition of "mental or physical impairment," which is proposed by the Department is actually a portion of the definition for that term from the Federal government's Americans With Disabilities Act (ADA) regulations at *29 CFR 1630.2(h)*, which are cross-referenced within the FMLA definition for the term "incapable of self-care." The Department has the discretion to adopt only those portions of the FMLA and/or ADA definitions, which it deems useful for purposes of implementing the family leave insurance benefits law or not to adopt any part of the FMLA or ADA definitions, if it believes that the use of those definitions would be inappropriate within this particular context. The Department has chosen to adopt the ADA definition of "mental or physical impairment" minus that portion of the definition, which refers to a substantial limitation of a major life activity. The omitted language from the ADA definition for "mental or physical impairment" concerns [page=1054] the ADA standard for "disability," which has never been adopted within New Jersey law or regulation. The Department does not wish through its adoption of definitions for the limited purpose of implementing the family leave insurance benefits law (P.L. 2008, c. 17), to in any way adopt, import or imply that it is adopting or importing from the Federal law or regulations the ADA concept of "disability." Rather, the Department is using certain language from the FMLA and ADA regulations, which it believes would be useful for purposes of implementing P.L. 2008, c. 17. This policy decision is well within the Department's discretion.

COMMENT: Mr. Rogers states, "[p]roposed rule [*N.J.A.C.] 12:15-1.2(b)* Maximum Benefit Rates contains the 2007 benefit rates instead of the newly promulgated benefit rates." He recommends the following: "The Association respectfully requests clarification as to the proper benefit rate for short term disability and family leave insurance benefits for 2009. While it anticipates that the proper maximum rate should coincide with the rate announced in the New Jersey Register at *40 N.J.R. 4913(a)*, the overlap of these proposals has created uncertainty as to the proper benefit."

RESPONSE: As indicated in the notice of proposal, the maximum weekly benefit rate for family leave insurance benefits will be identical to the maximum weekly benefit rate for temporary disability insurance (TDI) benefits. The Department, on December 15, 2008 (*40 N.J.R. 6980(a)*), adopted amendments to *N.J.A.C. 12:15-1.2*, which establish the 2009 maximum weekly benefit rate for State Plan benefits under the Temporary Disability Benefits Law as $ 546.00 per week. *N.J.A.C. 12:15-1.2(c)* states that this maximum weekly benefit rate becomes effective for calendar year 2009 on periods of disability commencing on or after January 1, 2009. When the proposed amendments to *N.J.A.C. 12:15-1.2*, which are contained within the family leave insurance benefits notice of proposal (October 6, 2008, 40 N.J.R. 5509(a)), become effective (upon publication of this notice of adoption in the New Jersey Register), the text of *N.J.A.C.*

12:15-1.2(b), within the New Jersey Administrative Code, will read, "The maximum weekly benefit rate for State Plan temporary disability and family leave insurance benefits under the Temporary Disability Benefits Law is hereby promulgated as being $ 546.00 per week." The text of *N.J.A.C. 12:15-1.2(c)* will read, "These maximum benefits shall be effective for the calendar year 2009 on unemployment compensation benefit years and periods of disability and family leave commencing on or after January 1, 2009." This is clear and unambiguous. Any confusion, which may have resulted from the unavoidable simultaneous processing of the two separate notices of proposal, (1) for the annual rate increases and (2) to implement the family leave insurance benefits law, should be eliminated following the publication of this notice of adoption and the subsequent updating of the New Jersey Administrative Code, which will occur well before the July 1, 2009 start date for the payment of family leave insurance benefits.

COMMENT: Mr. Rogers maintains that proposed N.J.A.C. 12:17-22, Claims for Family Leave Insurance Benefits During Unemployment, "should be amended to clarify that an employer's unemployment insurance experience rating will not be impacted in any manner due to the collection of any family leave insurance benefits during a period of unemployment."

RESPONSE: Pursuant to the family leave insurance benefits law, P.L. 2008, c. 17 (specifically, *N.J.S.A. 43:21-7(d)(G)(ii)*), family leave insurance benefits during unemployment will be paid from the "Family Temporary Disability Leave Account" within the State Disability Benefits Fund. Thus, the payment of family leave insurance benefits to any given claimant will cause no draw on the unemployment compensation trust fund and, therefore, will trigger no change in the employer's unemployment insurance experience rating. This is clear from *N.J.S.A. 43:21-7(d)(1)(G)(ii)* and requires no rule amendment.

COMMENT: Mr. Rogers indicates that the Department has made available to employers on its website the "notice to workers," required under proposed *N.J.A.C. 12:21-1.8*. He adds that the Department indicates on its website that the notice should be posted by employers no later than December 15, 2008. Mr. Rogers objects to this timeline for the posting of the notice, since he says it is inconsistent with P.L. 2008, c. 17, which requires that the notice shall be provided to workers by employers no later than 30 days after the form of the notification is issued by regulation. Mr. Rogers also recommends that the Department change *N.J.A.C. 12:21-1.8* on adoption so as to (1) include the form of the notification in its entirety and (2) require that the Department make the notice available to employers electronically.

RESPONSE: Proposed *N.J.A.C. 12:21-1.8(b)*1 states unambiguously (and consistent with P.L. 2008, c. 17, section 10g) that each employer shall provide each employee of the employer with a written copy of the notification "not later than (30 days following the effective date of this chapter)." The website posting referred to by Mr. Rogers is more of a request than a requirement that employers provide the notification to employees no later than December 15, 2008. The Department included this request along with the electronic version of the notification in light of the then fast approaching January 1, 2009 effective date of the law and the anticipated increase in questions and concerns coming from the affected worker community. The Department has no intention of enforcing the December 15, 2008 timeframe. Again, pursuant to both the law and new *N.J.A.C. 12:21-1.8(b)*1, the notification to workers must be provided to each employee no later than 30 days after the effective date of these amendments and new rules (the effective date of the amendments and new rules would be the date of publication of this notice of adoption in the New Jersey Register).

With regard to Mr. Rogers' remaining comments, the Department has complied with the law in that it is promulgating a regulation, which sets forth the details of the "notice to workers" requirement and which states (see *N.J.A.C. 12:21-1.8(d)*) that the notification poster and the written notification shall be made available by the Department to any employer upon request by the employer to the Department. The regulation also includes a mailing address to which such requests may be forwarded. The Department declines to accept Mr. Rogers' recommendation that it change *N.J.A.C. 12:21-1.8* on adoption, so as to require the Department to provide the above-mentioned notifications to employers electronically. However, as indicated by Mr. Rogers, the Department does, in fact, make the notifications available electronically on its website and has every intention to continuing doing so.

COMMENT: Mr. Rogers objects to the requirements within new *N.J.A.C. 12:21-2.11* and *2.12* that if employees are required to contribute to the cost of a private plan, a majority of the employees to be covered by the plan must agree by election to the establishment of the plan and that approval of a private plan shall be conditioned upon evidence that the employer has conducted the election and has obtained consent of the majority of covered employees. He states that he can find no authority within the enabling statute for the Department's requirement to hold an election.

RESPONSE: P.L. 2008, c. 17, the law which establishes the FLI benefits program, amends the TDB law. *N.J.S.A. 43:21-33*, within the TDB law, requires that employees give their consent through an election if employees are to be required to contribute toward the cost of "benefits under a private plan." When *N.J.S.A. 43:21-33* speaks of "benefits

under a private plan," that includes FLI benefits and any requirement for approval of a private plan for the payment of "benefits" contained within *N.J.S.A. 43:21-33* applies equally to both TDI and FLI benefits. Consequently, the requirements within *N.J.A.C. 12:21-2.11* and *2.12* regarding employee consent and evidence of consent are mandated by statute.

COMMENT: Mr. Rogers objects to proposed new *N.J.A.C. 12:21-3.2(f)*3, which states that upon a showing of good cause by the claimant, the Division may, on a claimant-by-claimant basis, waive the requirement that the claimant have a valid Social Security number (SSN) when filing a claim for benefits. He states that this provision "will lead to ineligible employees receiving family leave [insurance] benefit payments."

RESPONSE: The TDB law, as amended by P.L. 2008, c. 17, contains no requirement that an individual have a valid SSN in order to file a claim for temporary disability insurance benefits or family leave insurance benefits. Nevertheless, the Department has, by rule, traditionally required the possession of a valid SSN as a prerequisite to filing a TDI benefits claim. As indicated in the two FLI rule proposals, the format and content of the family leave insurance benefits rules are modeled on the rules that govern the TDB program. Following the pattern set by the TDI rules, the proposed FLI rules include an SSN requirement at *N.J.A.C. 12:21-3.2(f)*. However, the Department has decided that there [page=1055] should be a good cause exception, so that an individual who is authorized to work in the United States, who has been contributing through the payment of contributions to the State Disability Benefits Fund, but who has, as of yet, not received an SSN, would not necessarily be precluded from receipt of FLI benefits. In the absence of a statutory requirement that an individual possess a valid SSN in order to file an FLI benefits claim, the Department has the discretion to include such a good cause/waiver provision within its rules.

COMMENT: Mr. Rogers supports proposed *N.J.A.C. 12:21-3.4*, regarding reestablished claims, and recommends that it be adopted as proposed. Specifically, he states: The Association strongly supports proposed rule [*N.J.A.C.] 12:21-3.4* which requires an eligible claimant to serve a seven day waiting period for certain reestablished claims. In cases where the care recipient for the reestablished claim is a different individual than the care recipient that gave rise to the first claim for family leave insurance benefits, the claimant should be required to serve an additional seven day waiting period. Essentially, the claimant is filing a completely new form for benefits and should not be entitled to collect until after the waiting period has expired. In cases where the eligible claimant has changed employers within the same 12 month period of family leave benefits, to have the claimant immediately begin to collect benefits would be particularly onerous to the new employer. The Association is confident that the proposed rule will reduce potential fraud and abuse and still allow a claimant to receive the full benefits in appropriate cases.

RESPONSE: The Department thanks the commenter for his support.

COMMENT: Mr. Rogers states that "Proposed Rule [*N.J.A.C.] 12:21-3.5*, Reduction of Benefits, should not provide the claimant with the ability to receive family disability benefits in addition to any wages provided by the employer." He adds, "the Association is concerned that proposed regulation [*N.J.A.C.] 12:21-3.5* will allow an eligible claimant to essentially double-dip from the family disability leave insurance benefit and any paid time off provided by the employer." Mr. Rogers states: The proposal permits an employee to keep family leave insurance benefits and any wages provided by the employer pursuant to the employer's decision to require the use of up to two weeks work of any paid vacation, sick or other paid time off. The proposal notes that the employer must notify the Department "within a reasonable and practicable time" of the use of any paid vacation, sick or other paid time off used in connection with a period of family leave insurance benefits.

RESPONSE: Proposed new *N.J.A.C. 12:21-3.5* does not require the employer to "notify the Department of the use of any paid vacation, sick or other paid time off," nor does it allow "double dip[ping]" of FLI benefits. Rather, it states that where the employer has chosen to require an employee to use up to two weeks of paid time off at full pay during a period of family leave and where that employer wishes to have the maximum six-week FLI benefit entitlement of that employee reduced by the number of days of paid time off at full pay, then the employer must, within a reasonable and practicable time, submit a request to the State plan or the private plan, asking that the State plan or the private plan reduce the employee's maximum six-week FLI benefit entitlement accordingly. For example, if an employer who uses the State plan decides, as is its prerogative, to require an employee to use two weeks of paid time off at the beginning of a period of family leave (as that term is defined within N.J.A.C. 12:21-1.2), the employer may require the use of that paid time off without first notifying the Department. If, however, the employer in this example wants the State plan or private plan to reduce the employee's maximum six-week FLI benefit entitlement by those two weeks, then the employer must submit a request to the State plan or private plan for the reduction of the maximum entitlement. Where such request has been made, the employee would emerge from the two weeks of paid time off with only four remaining weeks

of FLI benefit entitlement during the 12-month period. Where such request has not been made, the employee would emerge from the two weeks of paid time off with his or her full six-week FLI benefit entitlement intact. In either case, the employee has not collected a single dollar of FLI benefits for a single day during that first two-week period. Nevertheless, proposed *N.J.A.C. 12:21-3.5* permits the employer to request that the maximum six-week FLI benefits entitlement be reduced by two weeks. This is the opposite of "double-dipp[ing]" from family leave insurance benefits. It is allowing a reduction in the maximum benefit amount when the benefits have not actually been paid. Of course, the other way for the maximum FLI benefit entitlement to be reduced is simply through the payment of benefits to the claimant. For example, where the employee has collected one week of FLI benefits, his maximum six-week entitlement for that 12-month period is reduced by one week, from six weeks to five weeks. If three months later that employee collects another one week of FLI benefits, then his maximum entitlement for that 12-month period is reduced another week, taking it to four weeks. Under no circumstances do the rules permit an individual to receive FLI benefits at the same time that he or she is receiving full pay from his or her employer, whether he or she is working or taking paid time off.

COMMENT: Mr. Rogers objects to proposed new *N.J.A.C. 12:21-3.13*, regarding the filing of appeals, maintaining that it "does not afford employers with the ability to appeal a determination of family leave insurance benefits."

RESPONSE: P.L. 2008, c. 17, section 10e, states that, "[a]n employee taking family temporary disability leave or an employer from whom the employee is taking the leave shall have the same right to appeal a determination of a benefit for the family temporary disability leave made under P.L. 2008, c. 17, as an employee or employer has to appeal a determination of a benefit for the disability of the employee under the 'Temporary Disability Benefits Law,' P.L. 1948, c. 110 (C.43:21-25 et seq.), and any regulations adopted pursuant to the 'Temporary Disability Benefits Law,' P.L. 1948, c. 110 (C.43:21-25 et seq.)." Consequently, the Department's exclusion of the word "employer" from proposed *N.J.A.C. 12:21-3.13* was an error, which resulted in an inconsistency between the law and the proposed rules.

The Department is going to change *N.J.A.C. 12:21-3.13* on adoption so that it states, "Unless the claimant 'or the employer,' within seven calendar days after the delivery of a determination or notification thereof, or within 10 calendar days after such notification was mailed to his or her last-known address, files an appeal from such determination, it shall be final and benefits shall be paid or denied in accordance therewith." As indicated above, the change on adoption is required by law. Consequently, the Department asserts that this modification is appropriate on adoption.

COMMENT: Mr. Sarno takes issue with proposed N.J.A.C. 12:17-22.6(a), which states that 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)*. Mr. Sarno remarks: 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.

Mr. Sarno adds, "[the] Employers Association of New Jersey suggests that all benefits paid with respect to FLI be from this special fund as provided for in P.L. 2008, c. 17."

RESPONSE: N.J.A.C. 12:17-22.6 is intended to stand for the proposition that there will be no intermittent family leave insurance benefits during unemployment; which is to say, family leave insurance benefits during unemployment will only be paid in increments of seven days. Thus, in a given week, a claimant will only be able to collect either unemployment insurance benefits or family leave insurance benefits during unemployment; never both. Furthermore, family leave insurance benefits during unemployment will in every instance be paid from the Family Temporary Disability Leave Account within the State Disability Benefits Fund (See proposed N.J.A.C. 12:17-22.8, which states, "For each claimant who establishes entitlement to family leave insurance benefits during unemployment under *N.J.S.A. 43:21-4(f)(2)*, his or her claim shall be paid from the Family Temporary Disability Leave Account.")

COMMENT: With regard to proposed N.J.A.C. 12:21-1.1 (purpose and scope), Mr. Sarno states, "We appreciate the Department's efforts in [page=1056] 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."

RESPONSE: The Department thanks the commenter for his remark.

COMMENT: Mr. Sarno takes issue with proposed *N.J.A.C. 12:21-3.7*, entitled, "Notice from claimant to the employer." Specifically, Mr. Sarno states: This section outlines the timeframes necessary for an employee to provide notice to their employer of the need to be absent for [an] 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 [a] qualifying FLI reason. Such notice is critical because it triggers an employer's responsibility to provide information (see [*N.J.A.C.] 12:21-1.8*) and lack of 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.

Mr. Sarno adds, "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."

RESPONSE: The "notice from claimant to employer" provisions at proposed *N.J.A.C. 12:21-3.7* are entirely consistent with P.L. 2008, c. 17, which requires neither that the notice be in writing, nor that the notice contain any particular elements other than that it relay to the employer that the employee intends to take "family leave" as that term is defined at proposed N.J.A.C. 12:21-1.2. These notice provisions are intended to benefit the employer. They only trigger a single obligation on the part of the employer, which is to provide the employee with a written notification of the covered individual's rights relative to the receipt of family leave insurance benefits, which written notification will be provided to the employer by the Department in a form, which can be easily downloaded from the Department's website or obtained through the mail.

The sort of litigation alluded to by the commenter relative to the FMLA should not result from these notice provisions, since the issues at play in the FMLA context are entirely different than those in the FLI benefits context; one is a leave law (affecting leave entitlements administered by the employer), the other is a benefits law (affecting a benefit paid by the State plan or a private plan; not by the employer).

COMMENT: Mr. Sarno takes issue with proposed *N.J.A.C. 12:21-1.8(b)*3, which requires that the employer provide written notification to the employee of the individual's rights relative to the receipt of FLI benefits (which written notification is made available to the employer by the Department upon request), 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. Mr. Sarno suggests the following: EANJ suggests this language be modified to specify that notice should be provided only if there is 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.

RESPONSE: The Department declines to adopt a rule, which requires employers to determine for employees whether they may or may not have a payable FLI benefits claim as a prerequisite to providing the employee with a simple written notification of his or her rights. This would be unnecessarily complicated and would, the Department believes, be far more administratively burdensome for employers than simply handing the employee a pre-printed form in the event that he or she notifies the employer of plans to take time off to care for a seriously ill family member or to bond with a newborn or newly adopted child. Whether the employee would need five days off, or three weeks off, is, for FLI benefits purposes, the concern of the State plan or a private plan. All that the employer need know, again, for FLI benefits purposes, is that the employee is indicating that he or she needs the time off for a covered reason, in which case the employer would simply provide the employee the required written notification.

COMMENT: With regard to proposed *N.J.A.C. 12:21-3.5(c)*, which states that 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, Mr. Sarno suggests that the Department "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."

RESPONSE: The commenter is mistaken. Proposed *N.J.A.C. 12:21-3.5(c)* and (d) clearly indicate that although the employer may "require" the claimant, during a period of family leave, to use up to two weeks of paid sick leave vacation time or other leave at full pay, the employer may only "permit" the claimant, during a period of family leave, to use more than two weeks of paid sick leave, vacation time or other leave at full pay. The proposed new rules are supported by P.L. 2008, c. 17, section 10b, which states in pertinent part, "The employer of an individual may, notwithstanding any other provision of law, including the provisions of N.J.S.[A.] 18A:30-1 et seq., permit or require the individual, during a period of family temporary disability leave, to use any paid sick leave, vacation time or other leave at full pay

made available by the employer before the individual is eligible for disability benefits for family temporary disability leave pursuant to P.L. 2008, c. 17, **except that the employer may not require the individual to use more than two weeks worth of leave at full pay.**" (emphasis added).

COMMENT: With regard to proposed *N.J.A.C. 12:21-3.5(e)*, Mr. Sarno suggests that a portion of the FL-1 and FL-2 claim forms contain a section where the employer may request the reduction of an employee's maximum FLI benefits entitlement.

RESPONSE: The Department does intend to include questions for employers on the claim forms regarding paid time off and employer requests for reduction in the employee's maximum benefits entitlement.

COMMENT: Mr. Sarno suggests that the Department supply a telephone number employers may call for reporting suspected fraud in regard to FLI recipients. Additionally, Mr. Sarno suggests that, "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."

RESPONSE: Contact telephone numbers will be provided on decisions mailed to employers and are listed on the Department's website. Furthermore, there is a TDI fraud hotline, which should be used to report alleged FLI fraud. That telephone number is 609-984-4540, which is also listed on the Department's website.

N.J.A.C. 12:21-3.1(f) and (g) address independent medical examinations directed by the Commissioner or his or her designee, for State plan claims, and *N.J.A.C. 12:21-2.4* addresses independent medical examinations directed by private plans. Since it is the State plan or private plan paying the FLI benefits, it is the State plan or private plan, which is authorized to direct the care recipient to submit to an independent medical examination. Of course, this in no way prohibits the employer from requesting of the State plan or private plan that an independent medical examination be conducted. The ultimate decision as to whether to direct the independent medical exam will, however, lie with the State plan or private plan.

COMMENT: Mr. Sarno presents the following questions: 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 [page=1057] employee gives birth in September 2008. In July 2009, she requests leave to care for the newborn, would she be entitled to FLI benefits?

RESPONSE: The answer to each of Mr. Sarno's questions listed above is "yes." That is, yes, FLI benefits would be provided to the individual whose leave for a covered reason began prior to July 1, 2009; yes, the employee who begins leave on June 15, 2009 is entitled to FLI benefits for his absence from July 1, 2009 forward; yes, that individual would have to serve a waiting week; and, yes, the employee in the final scenario, who gives birth in September 2008 and submits a claim for FLI benefits in July 2009, would be eligible for FLI benefits beginning in July 2009. However, if the employee in the final scenario gives birth in May 2008 and submits a claim for FLI benefits in July 2009, that employee would not be eligible for FLI benefits beginning in July 2009, because the family leave insurance benefits law only covers bonding leave to be with a child during the first 12 months after the child's birth. See P.L. 2008, c. 17, section 2, definition of the term "family temporary disability leave."

COMMENT: Mr. Sarno asks the following questions: 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?

RESPONSE: Proposed N.J.A.C. 12:21-1.2 defines "12-month period" to mean, "with respect to an individual who establishes a valid first claim for family leave insurance benefits, the 365 consecutive days that begin with the first day that the individual establishes the claim." Thus, in the scenario presented above, where the employee had received 42 days of intermittent family leave insurance benefits during the 12-month period beginning with the first day that the employee established a claim, he would be eligible for another 42 days of FLI benefits to care for the same seriously ill family member beginning on the 366th consecutive day from the first day that he had established the claim. When the new 12-month period begins, the employee's maximum FLI benefits entitlement is reset to six weeks (consecutive) or 42 days (intermittent).

COMMENT: Mr. Sarno asks the following question: 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" ([*N.J.S.A.] 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?

RESPONSE: The answer to the commenter's question is, "yes." No FLI benefit payment will be made for any day on which a claimant performs work for remuneration or profit.

COMMENT: Ms. Warren, whose association represents the temporary staffing industry, asks the following questions: A temporary employee on assignment with a client 40 hours per week has become eligible for paid family leave and applies for either intermittent or continuous leave. The staffing firm has more than 50 employees. As a result of the unavailability of the employee to all of the client's needs or requirements, the client determines that the individual requesting paid leave is no longer meeting its business need and therefore advises the staffing firm that it wants the temporary employee to be replaced or the assignment terminated. The reason provided by the client could be "no reason offered" or "poor performance" or anything else. In the paid family leave act there is however a requirement on the staffing firm to maintain an employment relationship with the temporary employee. How is the staffing firm able to address its business reality and comply with the requirements of the new law--requirements it is not always able to fulfill due to business circumstances and its inability to control the return to work?

RESPONSE: The commenter is mistaken. Neither the family leave insurance benefits law, P.L. 2008, c. 17, nor the proposed amendments and new rules, require the staffing firm to "maintain an employment relationship with the temporary employee." As has been explained a number of times, including within the body of the proposed amendments and new rules (See proposed N.J.A.C. 12:21-1.1), the family leave insurance benefits law, P.L. 2008, c. 17, and the proposed regulatory amendments and new rules, extend the TDB program, so as to provide to covered individuals family leave insurance benefits, a monetary benefit (not a leave entitlement), which protects the 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 bond with a newborn or newly adopted child. The commenter's questions appear to concern application to her members of the existing New Jersey Family Leave Act, *N.J.S.A. 34:11B-1* et seq., which has the 50 employee threshold alluded to by the commenter and which requires the employer to maintain an employment relationship during a period of leave to care for a seriously ill family member or to be with a newborn or newly adopted child. The commenter should address her concerns with regard to the issues presented in her question in whatever manner she has been addressing them these many years since the passage of the New Jersey Family Leave Act in 1989.

COMMENT: Ms. Walters expresses a number of concerns relative to obtaining Department approval for private FLI benefits plans prior to January 1, 2009 and recommends that the Department allow employers, who already utilize a private plan for their employee temporary disability benefits, to continue to utilize their private plan for the new FLI benefit with a 120-day grace period to get all of the necessary forms, approvals and elections approved by the Department. She states that, "this way, the new FL benefit process can be implemented appropriately beginning with collections on January 1, 2009, with 120 days to get the appropriate approvals in place before claims begin to be processed on July 1, 2009."

RESPONSE: The Department declines to delay the implementation of the private plan requirements for 120 days. As indicated in response to an earlier comment, it is the Department's belief that the TDB law, amended by P.L. 2008, c. 17, imposes all of the same requirements for Division approval upon FLI benefits private plans as it does upon TDI benefits private plans. The Department has no discretion to delay implementation of the private plan approval requirements as requested by the commenter. Private plan carriers should submit their plan approval paperwork to the Division and the Division will do everything in its power to expedite the processing of those approval requests. In the meantime, employees not covered under an approved private plan will be covered under the State plan. Incidentally, as of January 22, 2009, the Division of Temporary Disability Insurance has approved 14 FLI private plans.

COMMENT: Ms. Wean asks whether proposed *N.J.A.C. 12:21-2.15* through *2.19*, pertaining to termination of private plans by employees only applies to contributory private plans and not to private plans that take no contributions for employees.

RESPONSE: As explained in response to earlier comments, the law does not distinguish between TDI benefits private plans and FLI benefits private plans for purposes of approval and termination criteria and procedures. Consequently, since it would appear from *N.J.S.A. 43:21-35* that the termination provisions, allowing a majority of covered employees of an approved private plan to, by a majority vote, petition the Division to withdraw approval of the private

plan, apply to all approved private plans (not just contributory private plans), then the provisions at *N.J.A.C. 12:21-2.15* through *2.19* would also apply to noncontributory private FLI benefits plans.

As also explained in response to earlier comments, and in the notice of proposal for amendments and new rules within *N.J.A.C. 12:15, 12:17* and 12:21, these new rules are modeled on the TDI rules at *N.J.A.C. 12:18*. Toward that end, proposed *N.J.A.C. 12:21-2.15* through *2.19* are virtually identical to *N.J.A.C. 12:18-2.15* through *2.19*. Private plan carriers should apply the provisions of proposed *N.J.A.C. 12:21-2.15* through *2.19* to FLI benefits plans in the same manner that they have been applying *N.J.A.C. 12:18-2.15* through *2.19* to TDI benefits plans for these many years since the adoption of those sections of the Department rules.

[page=1058] COMMENT: Ms. Wean asks whether the requirement at *N.J.A.C. 12:21-2.29(c)*3, that self-insured private plans report the "direct cost of administration of the plan during that year," seeks the amount of family leave benefits paid during the year.

RESPONSE: *N.J.A.C. 12:21-2.29(c)*3 requires the reporting of all direct costs of administration of the plan during the year, including the amount of family leave benefits paid during the year and any other costs of administration. The preceding two paragraphs require the self-insured private plan to report the amount of funds available at the beginning of that year for the payment of family leave insurance benefits and the amount contributed by workers during that year, respectively. It is clear that through this series of questions, the Department is seeking to assess the financial ability of the self-insurer to meet the self-insured's obligations under the plan for the given year. Common sense, therefore, dictates that, in response to *N.J.A.C. 12:21-2.29(c)*3, the self-insured private plan provide a report of all costs of administration - in other words, all money leaving the plan in the course of administering the plan during the given year.

COMMENT: Ms. Wean states: The Department's [S]ummary indicates that several definitions in the proposed regulation were adopted from the United States Department of Labor regulations. It appears that the definition of serious health condition . . . is identical to that set forth in existing *29 CFR 825.115*. However, that definition has been amended, effective January 16, 2009. For the sake of consistency it is recommended that the proposed definition be updated to reflect the new [F]ederal regulatory language.

RESPONSE: The definition for the term "serious health condition," which appears in the proposed amendments and new rules is taken verbatim from P.L. 2008, c. 17, the law, which establishes the family leave insurance benefits program (specifically, see P.L. 2008, c. 17, section 2(s), where the statutory definition of the term "serious health condition" appears). The Department has no discretion within its rules to deviate from the New Jersey statutory definition.

COMMENT: Ms. Wean observes that many of the proposed rules pertaining to the FLI State plan also apply to FLI private plans. She suggests that those rules be adopted within N.J.A.C. 12:21-2 (private plans).

RESPONSE: As has been explained in response to previous comments, the Department modeled *N.J.A.C. 12:21* (FLI) on *N.J.A.C. 12:18* (TDI). The same situation regarding State plan rules relative to private plan rules, which exists within proposed new *N.J.A.C. 12:21* also exists within *N.J.A.C. 12:18*. With regard to TDI, the Division's approach in the past regarding application of the State plan eligibility and benefit requirements to private plans, has been to invoke *N.J.S.A. 43:21-32* (Establishment of private plans), where it states that eligibility requirements for benefits under a private plan shall be no more restrictive than as provided in the TDB law for benefits payable by the State plan and the weekly benefits payable under a private plan for any week of disability shall be at least equal to the weekly benefit amount payable by the State plan. As has been indicated in response to previous comments, the Department intends to administer the FLI benefits program in the same manner that it has administered the TDI program for these many years. NJM should rely heavily on its considerable experience with its TDI self-insured private plan, when it has concerns about the requirements for administering a self-insured private plan for FLI. Where those concerns persist, the commenter should feel free to reach out to the Division for guidance.

COMMENT: Ms. Davis expresses concern about proposed *N.J.A.C. 12:21-3.7(d)*, which provides that failure by the claimant to provide the employer with "reasonable and practicable" notice of the family leave, where the claimant is applying for family leave insurance benefits to be taken on a continuous, non-intermittent basis to care for a family member with a serious health condition, will not result in either a reduction in the claimant's maximum family leave insurance benefits entitlement or the denial of a claim for family leave insurance benefits. Ms. Davis is concerned that "reasonable and practicable manner" is not further defined in the regulations, "leaving the interpretation up to the employee." She is also concerned that the lack of a penalty for the employee's failure to provide the notice required under subsection (c), "will lead to employers getting blindsided by employees deciding to take Paid Family Leave and will, in turn, be in non-compliance with their statutory and regulatory responsibilities under this new law."

RESPONSE: This commenter erroneously refers to an employee "deciding to take Paid Family Leave." This error stems from the ongoing misconception that P.L. 2008, c. 17, as well as the amendments and new rules, establish a new leave program, which they most emphatically do not. Again, the FLI program is a benefit program, not a leave program. Consequently, when the commenter alleges that a particular provision will "lead to employers getting blindsided by employees deciding to take Paid Family Leave," she is mistaken. The notice that the employee is providing to the employer under *N.J.A.C. 12:21-3.7(c)* is that the employee intends to file a claim for family leave insurance benefits. With regard to the leave itself, the employee would still be required to provide to the employer whatever sort of notice is mandated under either the FLA, FMLA, collective bargaining agreement or employer policy. Again, the notice referred to in *N.J.A.C. 12:21-3.7(c)* is merely a requirement related to the receipt of a benefit, not to the taking of a leave. Consequently, if the employee fails to provide the required notice, the employer is only potentially going to be "blindsided" that the employee had filed a claim for family leave insurance benefits. The filing of a claim by the employee for a monetary benefit, paid by either the State plan or an approved private plan (not by the employer), and the receipt by that employee of the monetary benefit should have little or no impact on the day-to-day operations of the employer. Whereas many employers appear to be evaluating the FLI benefits program using the model of the FLA and FMLA, it would be advisable for them to think of the FLI benefits program as analogous to the existing TDI benefits program. The FLI benefits program is part of the TDI benefits program and will be administered in much the same way as the TDI benefits program has been administered for more than 60 years.

Regarding the substance of the commenter's remark, she is looking at the "reasonable and practicable manner" language in entirely the wrong way when she says that it is "leaving the interpretation up to the employee." In fact, the use of this phrase was intended to give some flexibility to employers. The Department could have defined "reasonable and practicable" to be a particular number of days, but instead, recognized that each employer has different business concerns and what may be reasonable and practicable to one employer may not be reasonable and practicable to another. Therefore, the employer should set the standard as to what is reasonable and practicable and relay that standard to its employees. The Department would only get involved in judging the sufficiency of that standard where it must do so within the context of adjudicating a particular claim. In light of the lack of a sanction for failure to provide the notice, it is unlikely that this will occur often.

With regard to proposed *N.J.A.C. 12:21-3.7(d)*, P.L. 2008, c. 17, section 12b expressly states that failure of an employee to provide the employer with 30 days notice of the period of family leave upon which the employee's claim for family leave insurance benefits to bond with a newborn or newly-adopted child will be based, shall result in a reduction in the claimant's maximum family leave insurance benefits entitlement for the 12-month period by an amount of benefits attributable to two weeks of family leave, unless the time of the leave is unforeseeable or the time of the leave changes for unforeseeable reasons. The law, however, is silent as to any sanctions for failure of an employee to provide notice of a claim for a purpose other than bonding with a newborn or newly-adopted child. In light of this conspicuous silence on the part of the Legislature, the Department believes that it would be inappropriate to impose such sanctions by rule, especially in light of the overall remedial intent of the FLI benefits program. Consequently, rather than leave the issue open to debate, the Department felt a duty to state affirmatively within the rules that no reduction in the maximum FLI benefits entitlement and no denial of benefits would result from failure to provide notice of a claim for purposes other than bonding with a newborn or newly-adopted child. The purpose of rules is to provide clarity. With proposed *N.J.A.C. 12:21-3.7(d)*, the Department has provided clarity and, it is hoped, as a result, there will be fewer disputes requiring the time and effort of employers, employees and Department staff.

[page=1059] COMMENT: Ms. Davis takes issue with proposed *N.J.A.C. 12:21-3.7(f)*, which states that failure by the claimant to provide the employer with 15 days notice of an intermittent family leave insurance benefits claim will not result in reduction in the claimant's maximum family leave insurance benefits entitlement or the denial of a claim for family leave insurance benefits. The nature of Ms. Davis' objection is the same as that summarized above with regard to proposed *N.J.A.C. 12:21-3.7(d)*.

RESPONSE: The Department's response is the same as that above relative to proposed *N.J.A.C. 12:21-3.7(d)*.

COMMENT: Ms. Davis states the following: [*N.J.A.C.] 12:21-3.9* details the notice required from employers when an employee enrolls in Paid Family Leave. The Chamber has concerns with the response times outlined in the proposed regulations and believes that employers should be given more time to review the information provided by the Department and appeal the Department's decision, if necessary.

Specifically, Ms. Davis takes issue with proposed *N.J.A.C. 12:21-3.9(a)*, which states that within 10 days after the mailing of a request for information with respect to a period of family leave, an employer shall furnish the Division with

any information requested or known to him or her, which may bear upon the eligibility of the claimant. She also objects to proposed *N.J.A.C. 12:21-3.9(d)*, which states that 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.

RESPONSE: Proposed *N.J.A.C. 12:21-3.9* (Notice required from employers) is modeled on existing *N.J.A.C. 12:18-3.7* (Notice required from employers), which pertains to TDI benefits. In fact, the wording of and timeframes contained within the two sections of Department rules, one pertaining to TDI benefits and the other pertaining to FLI benefits, is identical. As has been explained in response to previous comments, the Department intends to administer the FLI benefits program in much the same manner as it has administered the TDI benefits program for more than 60 years. If employers have been capable of responding to requests for information from the Division with regard to TDI benefits claims within 10 days after mailing of the request for information, then the Department fails to see why employers would be unable to respond to requests for information from the Division with regard to FLI benefits claims within the same period of time. The Department responds similarly with regard to the two-working-day time period for furnishing the Department with pertinent information following receipt of the eligibility determination.

COMMENT: Ms. Davis states the following: [*N.J.A.C.] 12:21-3.10* outlines the proposed regulations regarding intermittent leave. Under subsection (b), item number 3 explains that the employee taking the intermittent leave must make a "reasonable effort" to schedule their days off, so as to not disturb the operations of the employer. As intermittent leave is by far the most disruptive type of leave that can be taken to an operation and its other employees, we believe the regulations should require approval by the employer of the employee's proposed leave schedule. Requiring the employer to approve the proposed schedule will ensure that the schedule results in as little disruption as possible in the workplace.

RESPONSE: The requirements of proposed *N.J.A.C. 12:21-3.10(b)* are taken verbatim from P.L. 2008, c. 17, section 11. The commenter's concerns, the Department believes, derive from a misunderstanding as to the nature of the FLI benefits program. It is a benefit program, not a leave program. Therefore, if an employer wishes to place conditions on the granting of permission to take intermittent leave, the permissibility of such conditions would be governed by State and Federal leave laws, such as the New Jersey Family Leave Act and the Federal Family and Medical Leave Act. They could also be governed by a collective bargaining agreement or an established employer policy. But they will not be governed by the amendments and new rules contained within *N.J.A.C. 12:15*, *12:17* or 12:21, which pertain solely to the process whereby a covered individual files and, perhaps, is granted family leave insurance benefits (a monetary benefit, not leave).

COMMENT: Mr. Flynn takes issue with that portion of proposed *N.J.A.C. 12:21-2.4(a)*, which states that a caregiver covered under a FLI benefits private plan shall, if requested by the private plan insurer, have the care recipient submit to an examination by a licensed medical practitioner designated by the private plan insurer and that the examinations shall not be more frequent than once a week. Mr. Flynn suggests that the rule be changed to indicate that the examinations shall not be more frequent than once every two weeks. He states, "NJEA is concerned that the requirement for more frequent examination by private carriers could result in harassment of employees taking leaves and, as a result, could chill employees in the exercise of their rights under this law."

RESPONSE: The family leave insurance benefits law, P.L. 2008, c. 17, section 11c. (N.J.S.A. 43:21-39.2c.), states that "[a] covered individual claiming benefits to provide care for a family member with a serious health condition under the State plan or during unemployment shall, if requested by the division, have the family member submit to an examination by a health care provider designated by the division. The examinations shall not be more frequent than once a week, shall be made without cost to the claimant and shall be held at a reasonable time and place." The Department chose the approach to which the commenter objects in order to ensure consistency between the State plan and private plan requirements. Since the State plan has the discretion to require examinations of the care recipient once a week, the Department decided to provide an identical time frame to private plan carriers.

COMMENT: Mr. Flynn objects to proposed *N.J.A.C. 12:21-3.2(c)*3, which indicates that the health care provider certification contained within the family leave insurance benefits claim form (FL-1) shall state, "the medical facts regarding the serious health condition of the family member, of which the health care provider has personal knowledge." Mr. Flynn suggests that the provision be changed on adoption so as to state, ". . . of which the health care provider has personal knowledge and without the need for specifying a diagnosis." He explains, "NJEA is concerned that the medical information request specified by [this rule] could become too invasive of the family member's privacy rights." Mr. Flynn also objects to the identical requirement at proposed *N.J.A.C. 12:21-3.10(c)*, which applies to claims for intermittent family leave insurance benefits.

RESPONSE: The family leave insurance benefits law, P.L. 2008, c. 17, section 11b. (N.J.S.A. 43:21-39.2b.), states that the health care provider certification supplied to the State plan or private plan in support of a claim for family leave insurance benefits to care for a seriously ill family member must contain, among other things, "the medical facts within the knowledge of the provider of the certification regarding the condition." *N.J.A.C. 12:21-3.2(c)* and *3.10(c)* are entirely consistent with this statutory mandate. To make the change suggested by the commenter would be inconsistent with the law.

COMMENT: With regard to proposed *N.J.A.C. 12:21-3.11(a)* and (b), Mr. Flynn suggests that, as written, many school employees who work pursuant to 12-month or 11-month contracts, including during summer recess periods, will be barred from claiming family leave insurance benefits during their normal summer or other recess work time.

RESPONSE: On adoption, the Department will change *N.J.A.C. 12:21-3.11(b)* to read, "Under the circumstances set forth in (a) above, the individual who does not work for the educational institution between academic years or terms or during a school-wide recess shall not be eligible for family leave insurance benefits between academic years or terms or during a school-wide recess." This was the intention of the Department when it proposed *N.J.A.C. 12:21-3.11(a)* and (b). The change on adoption does not enlarge or curtail either the scope of the proposed new rules and amendments or those who will be affected by the new rules and amendments. Consequently, the Department asserts that this modification is appropriate on adoption.

COMMENT: Mr. Flynn believes that proposed *N.J.A.C. 12:21-3.11(e)*, as written, will result in 11-month and 10-month school employees receiving "a lesser benefit because their family leave happens to follow a period of school closure when they are not normally paid, such as summer recess." He apparently believes that the months during which the employee did not work during summer recess would be included within the calculation of "average weekly wage," thereby lowering the individual's "average weekly wage," thus, adversely affecting the individual's weekly family leave insurance benefit amount.

[page=1060] RESPONSE: By virtue of *N.J.S.A. 43:21-27(j)(3)*, in the event that the eight-week look-back for purposes of calculating the "average weekly wage," yields a result, which is less than the individual's average weekly earnings in employment with all covered employers during the base weeks in the 26 calendar weeks immediately preceding the week in which the period of disability (which includes a period of family leave) commenced, then the average weekly wage will, upon a written request to the Department by the individual on a form provided by the Department, be computed on the basis of earnings from all covered employers of the individual during the base weeks in those 26 calendar weeks. *N.J.S.A. 43:21-27(h)(4)* defines the term "base week" as follows: "any calendar week of an individual's base year during which the individual earned in employment from a covered employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to *N.J.S.A. 34:11-56a4* on October 1 of the calendar year preceding the calendar year in which the benefit year commences . . ." Thus, pursuant to *N.J.S.A. 43:21-27(j)(3)* and 27(h)(4), the weeks during which an 11-month or 10-month school employee does not work during the summer and, therefore, earns less than 20 times the minimum wage, will not be considered "base weeks" and will, therefore, be excluded from the 26-week look-back for purposes of calculating the "average weekly wage." This will result in the 11-month or 10-month school employee's "average weekly wage" being precisely what it would have been had the family leave commenced in the middle of the school year.

COMMENT: Mr. Wowkanech and Ms. Brennan note that proposed N.J.A.C. 12:17-22.2(b) states, "When requested by the Division, additional certification from a health care provider or licensed medical practitioner shall be filed as proof of continued need to participate in the providing of care for a family member of the claimant made necessary by a serious health condition of the family member." They suggest that language be added to this section indicating that any such additional medical certifications must be paid for by the employer.

RESPONSE: Submission of additional medical certification for periods not covered by the medical certification on record with the Division or the private plan or for periods not previously approved by the Division or private plan is the responsibility of the claimant, not the employer. The Department declines to make the suggested change.

COMMENT: Mr. Wowkanech and Ms. Brennan request that the waiting week requirement in proposed *N.J.A.C. 12:21-3.4(a)* be eliminated where a reestablished claim is filed during or following employment with a different employer than for the most recent previous claim.

RESPONSE: As with the other FLI amendments and new rules, the Department looked to the TDI law and rules for guidance on this issue. *N.J.S.A. 43:21-27(g)* defines the term "period of disability" with respect to a covered individual to mean, in pertinent part, "the entire period of time during which the covered individual is continuously and totally

unable to perform the duties of the covered individual's employment because of the covered individual's own disability, except that two periods of disability due to the same or related cause or condition and separated by a period of not more than 14 days shall be considered as one continuous period of disability; provided the individual has earned wages during such 14-day period with the employer who was the individual's last employer immediately preceding the first period of disability." The latter part of this definition is commonly referred to as the TDI relapse provision and, as indicated above, it permits the treating of two claims separated by not more than 14 days to be considered continuous, so long as the second claim is (1) based on the same disability, and (2) the individual has earned wages during the 14-day period with the same employer.

In establishing the parameters of a "reestablished claim" versus a "continued claim" within the FLI rules, the Department looked to the reasoning behind the TDI relapse provision, namely, that certain types of claims should be treated as a continuation of the first claim, rather than as a new claim. As to what characterizes a new claim (or reestablished claim) versus a continuous claim (or continued claim), for FLI purposes, the Department used essentially the same criteria as is used in TDI to define a relapse; which is to say, where there is either a different care recipient (analogous to a different disability in the TDI context) or a different employer, the claim is a reestablished claim, thereby requiring all of the formalities of a new claim, including the serving of a new waiting period.

The Department believes that this approach is consistent with its existing administration of the TDI program, pursuant to the TDI law, of which the family leave insurance benefits law, P.L. 2008, c. 17 is a part. Consequently, the Department declines to make the suggested change.

COMMENT: Ms. White states the following with regard to proposed N.J.A.C. 12:17-22.2(b): [T]he Division calls for unemployed applicants to provide additional certification by a health care provider or licensed medical practitioner when their leave needs to be continued. However, FLI applicants who are employed at the time of their application only have to submit a "continued claim form" to continue to receive FLI benefits. The Coalition does not see any reason that unemployed FLI beneficiaries should be required to provide more information to have their FLIU benefits extended beyond those on other FLI applicants. Therefore, we urge the Division to revise [N.J.A.C.] 12:17-22.2 to reflect the same process as described for employed FLI applicants that appears in [N.J.A.C.] 12:21-2.3(c) and (d) so that the same proof is required for both employed and unemployed applicants.

RESPONSE: As explained in response to earlier comments, the Department modeled proposed N.J.A.C. 12:17-22 (claims for family leave insurance benefits during unemployment) on existing N.J.A.C. 12:17-17 (claims for disability benefits during unemployment). *N.J.A.C. 12:17-17.1(b)* states that, "Additional medical certification shall be filed as proof of continued disability, when requested by the Division." As noted by the commenter, proposed N.J.A.C. 12:17-22.2(b) states in pertinent part, "When requested by the Division, additional certification from a health care provider or licensed medical practitioner shall be filed as proof of continued need to participate in the providing of care for a family member of the claimant made necessary by a serious health condition of the family member."

The commenter is correct that the words used in proposed *N.J.A.C. 12:21-3.2(d)* are different than those used in N.J.A.C. 12:17-22.2(b), but she is incorrect that those words have different meanings. Specifically, proposed *N.J.A.C. 12:21-3.2(d)* states, "A continued claim form **on which the claimant must provide additional medical information in order to continue receiving family leave insurance benefits** shall be filed as proof of continued family leave when requested by the Division." (emphasis added). Under proposed *N.J.A.C. 12:21-3.2(d)*, the claimant must still provide the necessary medical information in order to justify the continued claim. The only difference between this rule and the family leave insurance during unemployment rule, is that this rule specifies that the medical information will be submitted on a particular form.

COMMENT: Referring to proposed N.J.A.C. 12:17-22.7, entitled "Benefit determination," Ms. White states that the Division does not provide a specific time period by which an FLI applicant will receive notice of their FLI eligibility and amount of weekly benefit. She suggests that the Division should include within the rules a provision requiring that it provide FLI applicants with notice of their benefit eligibility and amount of benefit (if eligible) within seven days of the filing of the claim.

RESPONSE: Regarding the commenter's suggestion that the Department impose upon itself within the rules a requirement that it issue all eligibility determinations within seven days of the date of the claim, the law does not require it and the Department simply declines to do so. The Division issues determinations in as prompt a manner as is possible. The time that it takes to issue determinations is dependent on workload and resources at any given time. It would serve no meaningful purpose for the Department to impose such a time limit on itself within the rules.

COMMENT: Ms. White suggests that the Department add to proposed *N.J.A.C. 12:21-1.8(b)* two circumstances, beyond those already listed, which would give rise to the employer's obligation to provide written notice of the employee's rights relative to the receipt of family leave insurance benefits under P.L. 2008, c. 17. Specifically, Ms. White recommends that employers be required to provide such notice when (1) an employee requests Federal FMLA or NJFLA leave and (2) an employee requests temporary disability insurance benefits for either the employee's pregnancy or other temporary disability.

[page=1061] RESPONSE: The circumstances listed within proposed *N.J.A.C. 12:21-1.8(b)*, which would give rise to the employer's obligation to provide the above-mentioned notice were taken verbatim directly from P.L. 2008, c. 17, section 10g. (N.J.S.A. 43:21-39.1g). That list of circumstances appears to be exclusive; that is, there is no catch-all phrase within the law, which gives the Department the authority to add circumstances, which it may feel would also warrant imposing the notice requirement upon employers. The statute does not require that the subject notice be given by employers to employees under the two additional circumstances listed by the commenter. Thus, the Department does not have the discretion to impose that requirement on employers. To do so would require the Department to exceed its statutory authority.

COMMENT: Ms. White states the following with regard to proposed *N.J.A.C. 12:21-2.4*: The Coalition urges the Division to [include] additional measures that would give workers some recourse if a private insurer is unnecessarily forcing a worker's family member (who has a serious medical condition) to be subjected to re-certification by examination. While the draft rule states that these examinations shall not occur more than once a week, the Coalition is concerned that this could be particularly burdensome in certain instances where the care recipient has a chronic or particularly serious illness. . . . Therefore, we call for additional language in [*N.J.A.C.] 12:21-2.4* that provides workers the ability to appeal to the Division if they feel that their ill family members are being subjected to unnecessary examinations by a private insurer.

RESPONSE: As indicated in response to an earlier comment, the family leave insurance benefits law, P.L. 2008, c. 17, section 11c. (N.J.S.A. 43:21-39.2c.), permits the State plan to require that the family member submit to an examination by a health care provider designated by the Division, except that, among other things, the "examinations shall not be more frequent than once a week." Within proposed *N.J.A.C. 12:21-2.4* the Department is simply applying the same rules to private plans as are applied, by statute, to the State plan. The Department declines to make the suggested change.

COMMENT: Referring to proposed *N.J.A.C. 12:21-2.29*, *2.30* and *2.31*, which contain reporting requirements for self-insurers, unions and other benefit payers, and insurance companies, Ms. White recommends that the race and ethnicity of workers taking care-giving leave be included in the reports provided to the Division by employers.

RESPONSE: Information regarding the race and ethnicity of claimants is not collected, nor has it ever been collected for State plan claimants. This is true for TDI and, it is expected, will be true for FLI. Thus, to require private plan insurers to collect this information and report it to the Department would be inconsistent with the State plan and would result in the imposition of an undue burden on the private plans.

COMMENT: Ms. White joins Mr. Wowkanech and Ms. Brennan in requesting that the waiting week requirement in proposed *N.J.A.C. 12:21-3.4(a)* be eliminated where a reestablished claim is filed during or following employment with a different employer than for the most recent previous claim.

RESPONSE: The Department's response to Ms. White's comment is the same as its response to the same comment from Mr. Wowkanech and Ms. Brennan, discussed above.

COMMENT: Ms. White objects to proposed N.J.A.C. 12:17-22.3(b). She states: The NJTC also sees no need . . . to limit the payment of FLI benefits strictly to eligible employees who reside in the United States or Canada. We understand that this rule is consistent with the rules and regulations that govern the New Jersey TDI program, however, we strongly urge the Division to revise this rule to allow FLI payments to be paid to any eligible employee, regardless of the nation in which they reside.

RESPONSE: As mentioned in response to earlier comments, the FLI benefits law is part of the TDB law. The Department, therefore, intends to administer the two programs in the same manner, except where P.L. 2008, c. 17, makes exceptions for circumstances unique to FLI. Proposed N.J.A.C. 12:17-22.3(b) mirrors existing *N.J.A.C. 12:17-17.2(b)*, which applies to claims for TDI benefits during unemployment, and states in pertinent part, "Disability benefits shall be payable to a claimant residing in another state or in Canada, provided he or she complies with the requirements of the Unemployment Compensation Law and this subchapter." This provision apparently stems from the national agreement

for interstate unemployment compensation claims, which allows for the payment of claims based on employment in New Jersey by other states and Canada, so long as New Jersey reciprocates and agrees to pay claims originating from employment in other states and Canada. Because the requirements relating to the receipt of unemployment insurance benefits apply to both disability during unemployment and family leave insurance during unemployment claims, the language contained within *N.J.A.C. 12:17-17.2(b)* exists, which in turn, necessitates the inclusion of that language within proposed N.J.A.C. 12:17-22. The Department declines to make the suggested change to N.J.A.C. 12:17-22.

COMMENT: Ms. White is concerned with proposed *N.J.A.C. 12:21-3.5(a)*, regarding the reduction of benefits. She states: This section states that any amount that should be paid by the State FLI fund is to be reduced by the amount paid concurrently under any governmental or private retirement, pension or permanent disability benefit or allowance program. While we understand that this rule is consistent with the process that governs the reduction of TDI benefits; however it should not be applied to the FLI program as well.

RESPONSE: As indicated by the commenter, and as mentioned in response to earlier comments, the Department is administering the FLI program consistent with its administration of the TDI program, since they are both enabled by the same legislation, the TDB law. Proposed *N.J.A.C. 12:21-3.5(a)* mirrors existing *N.J.A.C. 12:18-3.4(a)*. There is no basis within the family leave insurance benefits law to justify adopting a different approach to this issue within the FLI context, than has already been adopted by the Department within the TDI context. The Department declines to make the change suggested by the commenter.

COMMENT: Ms. White states: [*N.J.A.C.] 12:21-3.10(a)*, regarding intermittent bonding leave, states that employees can take intermittent bonding leave, but only in non-consecutive periods of seven days or more (provided that both the employee and employer mutually agree). There is no provision in the regulations that allows for employees to take intermittent bonding leave for any period of less than 7 days. The Coalition feels that this section should be more flexible to allow intermittent bonding leave for periods as little as one day at a time, as long as it is mutually agreed upon by the employer and employee.

RESPONSE: The family leave insurance benefits law, P.L. 2008, c. 17, section 12a. (N.J.S.A. 43:21-39.3a.), states that, "[a]ll of the disability benefits paid to a covered individual during a period of family temporary disability leave with respect to any one birth or adoption shall be for a single continuous period of time, except that the employer of the covered individual may permit the covered individual to receive the disability benefits during non-consecutive weeks in a manner mutually agreed to by the employer and the covered individual and disclosed to the division by the employer." The Department has no discretion to deviate from this statutory mandate.

COMMENT: Ms. White is concerned about the definition of the term "parent of a covered individual," which appears within proposed N.J.A.C. 12:15-1.1A, 12:17-22.1 and 12:21-1.2. Specifically, she states: Our first concern is with the definition of "parent of a covered individual," which does not explicitly include domestic or civil union partners as the definitions of "child" and "family member" in the same section do. Therefore, a covered individual would not be eligible for FLI benefits if they took leave to care for the domestic or civil union partner of their biological or adopted parent unless this person was a legal guardian of the covered individual when they were a child. We urge the Division to make the definition of "parent of a covered individual" consistent with the definitions of "child" and "family member" and explicitly include domestic and civil union partners.

RESPONSE: The definition of the term "parent of a covered individual," which is included within the amendments and new rules comes verbatim from P.L. 2008, c. 17. The Department has no discretion [page=1062] to deviate from this statutory definition. However, the Department does have the discretion to further define the term "stepparent," which it will do on adoption in order not only to address the commenter's concern, but, more importantly, in order to fully comply with *N.J.S.A. 37:1-31*, which states in no uncertain terms, "civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in marriage." Specifically, the Department will include within N.J.A.C. 12:15-1.1A, 12:17-22.1 and 12:21-1.2, the following definition for the term "stepparent": "the person to whom the covered individual's biological parent is either currently married or with whom the covered individual's biological parent is currently sharing a civil union." The inclusion of this definition for the term "stepparent," should ensure that a covered individual is eligible for receipt of family leave insurance benefits to care for the seriously ill civil union partner of the covered individual's biological parent, regardless of whether the civil union partner of the covered individual's biological parent was a legal guardian of the covered individual when the covered individual was a child. As indicated above, this change on adoption is necessary in order to comply with *N.J.S.A. 37:1-31*. Therefore, it is appropriate to make this change on adoption.

COMMENT: Ms. White is concerned about the definition of the term "child," which appears within proposed N.J.A.C. 12:15-1.1A, 12:17-22.1 and 12:21-1.2. Specifically, she states: Our second concern . . . is with the definition of "child." While we initially supported this definition in our November 14, 2008 comments concerning the FLI payroll deduction regulations we are concerned about the limitations that the definition puts on those children who are 19 or older. According to this definition, the parent of a child over 19 years old would only be eligible for FLI benefits if their child becomes incapable of self-care because of a mental or physical impairment, rather than just being diagnosed with a serious illness. This added restriction would prevent many parents in New Jersey from receiving FLI in order to care for their children who deserve the right to wage replacement to care for their sick child. We urge the Division to revise this definition by removing the additional requirements needed for parents to care for their children who are 19 years or older.

RESPONSE: The definition of the term "child," which is included within the amendments and new rules comes verbatim from the family leave insurance benefits law at P.L. 2008, c. 17, section 2(k). The Department has no discretion to deviate from this statutory definition.

COMMENT: Mr. Malik and Ms. Agoratus submitted comments, which are identical to the comments submitted by Ms. White.

RESPONSE: The Department's responses to Ms. White above apply equally to Mr. Malik's and Ms. Agoratus' comments.

COMMENT: Ms. Mulford objects to proposed *N.J.A.C. 12:21-3.10(a)*. She states: This section states that employees may take intermittent bonding leave in non-consecutive periods of seven days or more, provided that both the employee and the employer mutually agree. There is no provision in the regulations that allows for employees to take intermittent bonding leave for any period of less than 7 days.

RESPONSE: The family leave insurance benefits law, P.L. 2008, c. 17, section 12a. (N.J.S.A. 43:21-39.3a.), states that, "[a]ll of the disability benefits paid to a covered individual during a period of family temporary disability leave with respect to any one birth or adoption shall be for a single continuous period of time, except that the employer of the covered individual may permit the covered individual to receive the disability benefits during non-consecutive weeks in a manner mutually agreed to by the employer and the covered individual and disclosed to the division by the employer." The Department has no discretion to deviate from this statutory mandate.

COMMENT: Ms. Mulford states: In [N.J.A.C.] 12:21-1.2, "bonding" is defined as "develop[ing] a psychological and emotional attachment between a child and his or her primary care giver(s)." New Jersey law provides paid time off for bonding. But when a mother gives her baby food, health protection, and care through breastfeeding, she is doing far more than "bonding" with her child. She has a physical attachment as well as a "psychological and emotional" attachment with her child, and this physical attachment benefits when mother and baby are in each other's presence. Therefore, it is our belief that the Family Leave Insurance Benefits regulations should interpret the law in a manner that protects breastfeeding as well as bonding.

RESPONSE: The amendments and new rules do "protect" breastfeeding in that a covered individual would be eligible to receive FLI benefits in order to bond with a newborn child, during which time a mother may, of course, breastfeed her child.

COMMENT: Ms. Yablonkai states: Regarding the paid family leave effective 7/1/09, I find it offensive that a small company (17 employees) which I work for would not have to hold my position while I will have the same amount taken from my check every week as an employee of a large company and their position is secure. I find this to be discriminatory. Also, I am single, as is my brother and sister. We have been in the N.J. Workforce for up to 40 years and need to know that if a serious health problem requiring us to take the 6 weeks off (after use of sick and vacation time due) that it applies to us as we would be the sole care givers for each other.

RESPONSE: As has been explained in response to earlier comments, family leave insurance benefits is a monetary benefit, not a leave entitlement. The commenter's remarks about differential treatment relative to obtaining family leave for employees of large employers, versus employees of small employers, pertains to separate laws altogether--the Federal Family and Medical Leave Act and the New Jersey Family Leave Act--which these rules do not concern.

As the commenter indicates, as a covered individual, she is being required by law to make contributions to the State Disability Benefits Fund for family leave insurance benefits. By virtue of being a covered individual, the commenter is also entitled to receive up to six weeks of family leave insurance benefits (again, a monetary benefit, not a leave enti-

tlement) during a 12-month period to care for a seriously ill family member or to bond with a newborn or newly adopted child. Incidentally, the term "family member" is defined both in the family leave insurance benefits law, P.L. 2008, c. 17, section 2(n), and within the regulatory amendments and new rules to mean, "a child, spouse, domestic partner, civil union partner or parent of a covered individual." Siblings are not included as "family members" for purposes of FLI benefits eligibility. Thus, under the law, the commenter would be unable to obtain family leave insurance benefits to care for her seriously ill brother or sister.

COMMENT: Dr. Kline states the following: I am a primary care physician . . . Paid Family medical leave act has already cost my employees and myself a great deal already. I serviced a client with hundreds of employees. I was the workers' compensation physician for this client, and about half of his workers decided to choose me as their family's primary care physician. This client had paid for the health insurance for his blue-collar workers. This client decided to leave South Brunswick precisely because of the costs he would incur with paid family medical leave. My client is now doing just fine--unfortunately he has relocated to the outskirts of Allentown Pennsylvania.

RESPONSE: The commenter takes issue with no specific provision within the amendments and new rules, but rather, expresses his dissatisfaction with the entire concept of what he refers to as "paid family medical leave." P.L. 2008, c. 17, established the family leave insurance benefits program. The amendments and new rules implement that law.

COMMENT: Ms. Bernstein writes: I am writing to inquire about the impact that the Paid Family Leave will have on teachers' seniority status. My company provides tenure and seniority consultation services to over 100 New Jersey school districts. The Seniority clock stops when a tenured teacher is out on an unpaid leave of absence for more than 30 days. This rule applies to Family Leave without pay as well. As I understand the new paid Family Leave law, the payment will be considered Family Temporary Disability Benefits rather than paid leave. Will the teacher utilizing this benefit continue to accrue seniority while on this leave as he/she would under any other paid leave?

[page=1063] RESPONSE: The Department has no authority to advise the commenter as to whether a teacher who is out on leave from work while collecting family leave insurance benefits will continue to accrue seniority. Again, the family leave insurance benefits law, P.L. 2008, c. 17, and the rules promulgated in accordance with that law, do not pertain to leave, but rather, pertain to payment of a monetary benefit. Seniority accrual is affected in one way or another by the taking of leave, not by the receipt of a disability or family leave insurance benefit.

COMMENT: Ms. Lewis suggests that the amendments and new rules should require that the claimant provide the Social Security number of the seriously ill family member as part of the claims intake process.

RESPONSE: In order to determine benefit eligibility and amount, the Department must evaluate the claimant's wages, which are recorded and tracked on the basis of the claimant's SSN. The Department does not require wage information for the care recipient in order to evaluate and pay a claim for family leave insurance benefits and, therefore, has no need to require the claimant to provide the care recipient's SSN as part of the claim process. The Department's only concern relative to the care recipient is whether that individual is a family member of the claimant and whether that individual is suffering from a serious health condition. Consequently, the Department declines to make the change suggested by the commenter.

COMMENT: Ms. Lewis asks the following series of questions: 1. Is there a maximum count of family members that can collect benefits to care for a family member? For example, in the case of covered illness of a parent who has a spouse and several adult children, can the spouse as well as all adult children collect benefits? 2. If the State does not allow for only one family member to collect benefits, would the physician or the State, based on the medical condition, make a determination of the total daily hours necessary to care for the ill family member in order to determine how many family members will be allowed to collect benefits? 3. If the State only allows for one person to collect benefits to care for a family member, then what process is put in place to ensure that only one family member submits documentation to the State and subsequently collects benefits? 4. Is there a draft or proposed form that will be used?

RESPONSE: Regarding question numbers 1 and 3, neither the law, nor the amendments and new rules contain a set maximum count of family members who can collect benefits to care for a single family member.

Regarding question number 2, the health care certification requirements are set forth at proposed *N.J.A.C. 12:21-3.2(c)* and include, among other things, the medical facts regarding the serious health condition of the family member, a statement that the serious health condition of the family member requires the participation of the covered individual in providing care to the family member, and an estimate of the amount of time, total time and frequency, that the services of the covered individual are required in order to participate in providing care to the family member.

Regarding question number 4, the amendments and new rules refer to the claim forms, which will be used by the State plan, namely, the FL-1 (Proof and claim for family leave insurance benefits) and the FL-2 (Proof and claim for family leave insurance benefits for bonding immediately following a State plan claim for pregnancy disability).

COMMENT: Ms. Sachau objects to the requirement within *N.J.A.C. 12:21-3.2(f)* that each claimant shall have a valid SSN. She states, "we all know that these cards are being sold on the street and used by illegal immigrants." Ms. Sachau also objects to the good cause exception to the SSN requirement found in proposed *N.J.A.C. 12:21-3.2(f)*3. She adds, "We also want a provision when someone is found to be submitting fake social security cards that the immigration department is immediately called in to pick up the illegal immigrant who should be in custody until found to have a valid reason for being in this state and country."

Ms. Sachau states with regard to proposed *N.J.A.C. 12:21-3.3* (filing of claims for benefits), that the Department should not accept claim forms through the mail, but rather, should require each claimant to personally visit the offices of the Department in order to file his or her claim. Ms. Sachau states that, "this will also show whether the person is real or another scam."

Finally, Ms. Sachau objects to proposed *N.J.A.C. 12:21-3.7* (Notice from claimant to employer). She states: This section does not protect the taxpayers of NJ from companies that employ relatives. It is clear that this program is subject to family companies taking clear advantage of giving family members a vacation based on fake information. This section does nothing to prevent those fake claims.

RESPONSE: The Department has explained in response to earlier comments its reasoning regarding the SSN requirement and the good cause exception to that requirement. With regard to the commenter's second concern, the Department has no intention of requiring claimants to appear in person to file claims. The Department is confident that its method of administration and its use of internal controls will effectively minimize fraud and ensure the recovery of overpayments. Finally, since the only obligation on the part of an employer, which is triggered by the notice provided by an employee to the employer under *N.J.A.C. 12:21-3.7* is that the employer must provide the employee with the written notification of rights required under *N.J.A.C. 12:21-1.8(b)*3, the Department does not see how *N.J.A.C. 12:21-3.7* is vulnerable to abuse by family companies. The Department will make no changes to the amendments and new rules in response to the commenter's remarks.

COMMENT: Ms. Mateo objects to the definition of the term "incapable of self-care," which appears within the definition of the term "child," which in turn appears within proposed new *N.J.A.C. 12:15*:1.1A, 12:17-22.1 and 12:21-1.2. Specifically, Ms. Mateo states: The definition of "incapable of self-care" found throughout the proposed regulations should be amended. First, the Department should clarify that the list of ADL's and IADL's is illustrative and not finite. Also, the statute is remedial in nature and the requirement of three ADLs is arbitrary. A care recipient's inability to perform even one serious ADL may require assistance (that is eating, walking, taking medication, etc.) and necessitate family leave. Accordingly, a physician's certification of need should be sufficient if even one important ADL is sufficiently impaired.

RESPONSE: The Department's definition for the term "incapable of self-care" applies only to the use of the term "child," as that term is used within the definition of the term "family member," for purposes of further defining the term "family leave." One need not establish that a care recipient is "incapable of self-care," as suggested by the commenter, in order to establish eligibility for family leave insurance benefits to care for a seriously ill family member. Rather, one need only establish that the care recipient, a family member, is suffering from a "serious health condition" and that this serious health condition necessitates the claimant's participation in the providing of "care." The definitions of the terms "serious health condition" and "care" are contained within proposed *N.J.A.C. 12:15*:1.1A, 12:17-22.1 and 12:21-1.2 and make no mention whatsoever of the term "incapable of self-care," or of ADLs or IADLs.

The "incapable of self-care" requirement applies only when the claimant is seeking to obtain family leave insurance benefits to participate in the providing of care to the claimant's child and where that child is 19 years of age or older. In such a case, in order for the claimant to be eligible for family leave insurance benefits, the child of the claimant who is 19 years of age or older must be "incapable of self-care because of a mental or physical impairment" and must also be suffering from a "serious health condition." This requirement is statutory. (See P.L. 2008, c. 17, section 3(k)). Consequently, where a claimant is seeking to obtain family leave insurance benefits in order to participate in the providing of care to any other type of family member--which is to say, to participate in the providing of care to a spouse, a domestic partner, a civil union partner, a parent or a child who is under the age of 19, that claimant need not establish that the care recipient/family member is "incapable of self-care due to a mental or physical impairment," but must rather simply establish that the care recipient/family member is suffering from a "serious health condition." Again, this requirement is

set forth within P.L. 2008, c. 17, the law, which establishes the family leave insurance program, from which the Department does not have the discretion to deviate.

[page=1064] As to the definition of the term "incapable of self-care" contained within the amendments and new rules, the Department has adopted this definition verbatim from the Federal Family and Medical Leave Act regulations (*29 C.F.R. 825.122*). The FMLA regulations use term "incapable of self-care" for virtually the identical purpose that the amendments and new rules use the term; that is, the FMLA regulations use the term to further define the term "son or daughter," for the purpose of addressing the right of an employee to take FMLA covered leave to care for a seriously ill son or daughter who is 18 years or older. It is due to the parallel purposes within the FMLA regulations and the FLI amendments and new rules for the use of the term "incapable of self-care," that the Department has chosen to adopt the definition contained in the FMLA regulations, which again, it is adopting word-for-word. It is the FMLA definition for the term "incapable of self-care," which requires that the adult child need active assistance or supervision to provide daily self-care in **three or more** of the "activities of daily leaving" (ADLs) or "instrumental activities of daily leaving" (IADLs). (emphasis added) In light of the foregoing, the Department's adoption of this standard is anything but arbitrary. As to the commenter's suggestion that the Department somehow "clarify that the list of ADLs and IADLs is illustrative and not finite," the existing definition states that, "Activities of daily leaving **include** adaptive activities, **such as** caring appropriately for one's grooming and hygiene, bathing, dressing and eating." (emphasis added). Furthermore, with regard to IADLs, the definition states, "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.**" (emphasis added). The clear and unambiguous meaning of phrases like "such as" and "etc." is that the lists of items that either succeed or precede those terms are not intended to be all inclusive. No further clarification is necessary and no change to the definition of the term "incapable of self-care" will be made on adoption.

COMMENT: Ms. Mateo objects to proposed N.J.A.C. 12:17-22.2 (Notice and proof of family leave). Specifically, she states: The section on the notice and proof is unclear and is inconsistent with the notice and proof language and process found at [*N.J.A.C.] 12:21-3.2*. While [subsection] (a) allows a claimant to file Form FL-1, the form is named "Proof and claim for family leave insurance benefits" suggesting that submission of the form also satisfies the proof requirement of [subsection] (b). [Subs]ection (b) contains no clarification about what is required or the time frame in which such proof should be submitted. The language "shall be furnished by any claimant who expects to be unable to work" seems to require submission of "proof" in *advance* of taking leave and is at odds with the statute and inconsistent with the time frame articulated under [subsection] (a). It is recommended that the proof and notice required of claimants be simplified and contained on one form to ensure easy compliance and processing. The regulation must clearly articulate the requirements of proof required. Lastly, the definition of good cause in [subsection] (c) is unnecessarily restrictive and should be consistent with the definition of good cause used in unemployment regulations related to reporting . . .

RESPONSE: As has been explained in response to earlier comments, proposed N.J.A.C. 12:17-22.2 (FLI benefits during unemployment; Notice and proof of family leave) mirrors *N.J.A.C. 12:17-17.1* (TDI benefits during unemployment; Notice and proof of disability) and proposed *N.J.A.C. 12:21-3.2* (FLI benefits; Notice and proof of family leave) mirrors *N.J.A.C. 12:18-3.2* (TDI benefits; Notice and proof of disability). The Department intends to administer the FLI benefits program in a manner that resembles as closely as possible its current administration of the TDI program. Consequently, the proposed new rules at N.J.A.C. 12:17-22.2 and *12:21-3.2* no more require the submission of proof of family leave "in advance of taking leave," than existing *N.J.A.C. 12:17-17.1* and *12:18-3.2* require the submission of proof of disability in advance of becoming disabled. The family leave insurance benefits law, P.L. 2008, c. 17, and the proposed amendments and new rules do not concern leave entitlement, but rather they pertain to a monetary benefit. The Department is not involved in the employer's decision as to whether or not to grant leave, but rather, is concerned only with whether the employee is on leave for a covered reason and whether the employee meets the FLI benefits eligibility requirements. In other words, it is the Department's belief that the language of proposed N.J.A.C. 12:17-22.2 could under no circumstances be read to suggest, as maintained by the commenter, that one must submit proof of family leave "in advance of taking leave."

Since, as explained above, the Department intends to administer the FLI program in a manner that as closely as possible resembles its administration of the TDI program, it is important that the Department, whenever possible, ensure that the rules governing the two programs mirror one another. If the Department was to make the changes suggested by the commenter it would have an effect opposite to the commenter's purported aim; which is to say, the changes would not "clarify" the requirements of the rule, but rather, would cause unnecessary confusion. Consequently, the Department will adopt the rule as proposed.

COMMENT: Similarly, Ms. Mateo suggests changes to proposed N.J.A.C. 12:17-22.6 (FLI during unemployment; Simultaneous unemployment and family leave insurance benefit periods); 12:21-1.3 (Service of papers); 12:21-1.4 (Reimbursement of funds); 12:21-3.1 (Extent of coverage); and 12:21-3.2 (Notice and proof of family leave). Each such suggested change is based on either a perceived inequity or perceived lack of clarity.

RESPONSE: In each instance, as described above with regard to proposed N.J.A.C. 12:17-22.2, the proposed new rule mirrors a rule, with the identical name and identical purpose, which currently exists either in N.J.A.C. 12:17-17 (Disability during unemployment) or 12:18 (Temporary Disability Benefits). The Department's reason for adopting each particular new rule and for declining to change that rule on adoption is the same as stated above in support of the adoption as proposed of N.J.A.C. 12:17-22.2. Specifically, the TDI rules have been in place for decades without any significant complaint or apparent confusion among workers, employers or private plan carriers. Most would agree that the TDI program is among the most effective benefits programs in State government. The Division of Temporary Disability Insurance, within the Department of Labor and Workforce Development, will be administering the new FLI program and intends to do so in a manner consistent with how it has successfully administered the TDI program. That consistency of administration is best served by a consistency in approach to rules.

COMMENT: Ms. Mateo asserts with regard to proposed N.J.A.C. 12:17-22.3 (FLI during unemployment; Procedures for filing of claims for benefits), the following: The limitation on filing claims by mail is restrictive and limiting for people who cannot write, may have impairments or language barriers and does not satisfy access needs and requirements. The regulation should be amended to also allow claims to be filed in person. Additionally, a new section should be added to the regulation regarding notice to claimants of required examinations, providing a limitation on the distance a seriously ill family member must travel to attend such an examination and awarding travel expenses to indigent claimants. Further, [subsection] (e) should be clarified and identify that the need to reschedule an examination shall not constitute a ground for disqualification.

RESPONSE: Again, but for the substitution of "family leave insurance benefits" for "disability benefits," this new rule, N.J.A.C. 12:17-22.3 (FLI during unemployment; Procedures for filing of claims for benefits) is identical to existing *N.J.A.C. 12:17-17.2* (Disability benefits during unemployment; Procedures for filing of claims for benefits). The Department's reasons for adopting this new rule as proposed are the same as those stated above in response to the previous two comments.

Furthermore:

1. There are no facilities for in-person filing;

2. The care recipient signs a release on the application to allow the care provider access to medical information;

3. There are provisions on the application for an authorized representative to act on behalf of the care recipient;

4. The care provider or authorized representative can assist the care recipient in completing the application;

5. The care recipient, care provider or authorized representative may call the Division of Temporary Disability Insurance with any questions with regard to completing the application;

6. The law does not provide for travel reimbursement;

[page=1065] 7. The Division or private plan will determine eligibility on a case-by-case basis in those situations where a care recipient does not report for an independent medical examination;

8. The Division's practice is to schedule examinations at a location as close as possible to the claimant's (TDI) or care recipient's (FLI) home;

9. Claimants who file private plan claims may request intervention by the Division if they believe that independent medical examination requests are unreasonable, whether the issue is frequency of, location of or reason for the examination; and

10. Information as to how to contact the Division on issues relating to private plan compliance are provided in the poster notification required to be posted at private plan worksite locations.

COMMENT: Ms. Mateo suggests adding the following sentence to proposed new N.J.A.C. 12:17-22.8, "Receipt of Family Temporary Disability Leave during unemployment does not otherwise reduce or modify a claimant's maximum benefit amount for unemployment as defined in *N.J.A.C. 12:17-2.1*."

RESPONSE: The effect of receiving family leave insurance benefits during unemployment upon a claimant's maximum benefit amount for unemployment insurance benefits during the same benefit year is explicitly addressed by the statute at *N.J.S.A. 43:21-3(d)(2)*, which states the following: No such individual shall be entitled to receive benefits under this chapter (*R.S. 34:21-1* et seq.) in excess of 26 times his weekly benefit rate in any benefit year under either of subsections (c) [unemployment insurance benefits] and (f) [temporary disability during unemployment benefits and family leave insurance benefits during unemployment] of *R.S. 43:21-4*. In the event that any individual qualifies for benefits under both of said subsections during any benefit year, the maximum total amount of benefits payable under said subsections combined to such individual during the benefit year shall be one and one-half times the maximum amount of benefits payable under one of said subsections.

Thus, an individual can receive no more than 39 weeks of benefits payments in any given benefit year in combination of all three: unemployment insurance benefits, temporary disability insurance benefits during unemployment and family leave insurance benefits during unemployment. The change on adoption suggested by the commenter is not consistent with this statutory mandate.

COMMENT: Ms. Mateo states that, "[j]ust as an employer is required to notice employees of the right to family leave, the Division should advise unemployment recipients of their right to family leave benefits. Such notice is consistent with the Division's notice obligations under other benefits programs (see *N.J.S.A. 43:21-30*-1)."

RESPONSE: At the outset, there is no such citation as *N.J.S.A. 43:21-30*-1. However, assuming that the commenter is referring to *N.J.S.A. 43:21-30(1)*, that provision addresses the nonduplication of benefits and has nothing whatsoever to do with notice to employees of their right to benefits under a State program. As to the merits of the commenter's remarks, the Division of Temporary Disability Insurance intends to request of the Division of Unemployment Insurance that they advise unemployment insurance recipients who become unavailable/unable to work because of the need to care for a seriously ill family member or to bond with a newborn or newly adopted child that they have a right to apply for family leave insurance benefits during unemployment. However, there is no need for the Department to impose such a requirement upon itself by rule. The Department declines to make the suggested change on adoption.

COMMENT: Ms. Mateo states the following with regard to proposed *N.J.A.C. 12:21-3.5*: This regulation is not clear. First, "reestablished claim" needs to be defined--it is not clear when this regulation would apply. Take the example of an employee who needs two weeks of leave to care for a sick relative. Five months later the employee needs to take three additional weeks of leave to care for the same relative. Is this a "re-established claim"? Second, any process for reestablishing a claim must be clearly articulated--there is no guidance as to what a claimant or employer is obligated to do under this scenario. Third, there is nothing that allows the Division to require a waiting period in addition to the initial one week period articulated by the statute. Had the [L]egislature intended additional waiting periods they would have said so. As such, the Division's requirement of additional waiting time is ultra vires and must be stricken.

RESPONSE: The commenter is incorrect; there is a definition for the term "reestablished claim" in the amendments and new rules. Specifically, the term "reestablished claim" is defined within N.J.A.C. 12:21-1.2 to mean, "a claim for family leave insurance benefits filed subsequent to a first claim within the same 12-month period, which claim is either a claim for a different care recipient or a claim during or following employment with a different employer." Also, the term "continued claim" is defined within the N.J.A.C. 12:21-1.2 to mean, "a claim for family leave insurance benefits filed subsequent to the first or reestablished claim, which claim is within the same 12-month period, for the same care recipient and during or following employment with the same employer." Thus, under the scenario posed by the commenter, namely, where a claimant collects two weeks of FLI benefits to care for a seriously ill family member and then five months later collects three weeks of FLI benefits to care for the same seriously ill family member, the second of the two claims would be a reestablished claim if the claimant is working for a different employer when he or she files the second claim, but this second claim would be a continued claim if the claimant is working for the same employer when he or she files the second claim.

As explained in response to an earlier comment, the Department looked to the TDI law and rules for guidance on this issue. *N.J.S.A. 43:21-27(g)* defines the term "period of disability" with respect to a covered individual to mean, in pertinent part, "the entire period of time during which the covered individual is continuously and totally unable to perform the duties of the covered individual's employment because of the covered individual's own disability, except that two periods of disability due to the same or related cause or condition and separated by a period of not more than 14 days shall be considered as one continuous period of disability; provided the individual has earned wages during such 14-day period with the employer who was the individual's last employer immediately preceding the first period of disability." The latter part of this definition is commonly referred to as the TDI relapse provision and, as indicated above, it

permits the treating of two claims separated by not more than 14 days to be considered continuous, so long as the second claim is (1) based on the same disability, and (2) the individual has earned wages during the 14-day period with the same employer.

In establishing the parameters of a "reestablished claim" versus a "continued claim" within the FLI rules, the Department looked to the reasoning behind the TDI relapse provision, namely, that certain types of claims should be treated as a continuation of the first claim, rather than as a new claim. As to what characterizes a new claim (or reestablished claim) versus a continuous claim (or continued claim), for FLI purposes, the Department used essentially the same criteria as is used in TDI to define a relapse; which is to say, where there is either a different care recipient (analogous to a different disability in the TDI context) or a different employer, the claim is a reestablished claim, thereby requiring all of the formalities of a new claim, including the serving of a new waiting period.

The Department believes that this approach is consistent with its existing administration of the TDI program, pursuant to the TDI law, of which the family leave insurance benefits law, P.L. 2008, c. 17 is a part.

Regarding the filing of claims, the procedures for filing all State plan claims are articulated within new *N.J.A.C. 12:21*. Furthermore, the Department's articulated approach to the issue of waiting periods relative to reestablished claims, discussed in detail above, is well within the Department's discretion under *N.J.S.A. 43:21-25* et seq., amended by P.L. 2008, c. 17.

COMMENT: Ms. Mateo suggest that "[subsection] (c) (of proposed *N.J.A.C. 12:21-3.5*) be amended to provide guidance on how intermittent leave will be calculated." Without such guidance, Ms. Mateo asserts, "there is the opportunity for arbitrary decision making." In addition, she states that "the time frame in [subsection] (e) must be circumscribed." Ms. Mateo states that, "as currently written an employer can make the request to deduct two weeks of leave from an employee's total entitlement well after the employee has received their full six weeks of benefits." Finally, Ms. Mateo maintains that, "the regulations as currently [page=1066] written do not clarify that the reduction by (sic) in entitlement to family leave insurance may not exceed two weeks, regardless of the amount of paid leave taken under the employer's policies."

RESPONSE: In response to previous comments, both in this notice of adoption and the notice of adoption published in the above-mentioned January 5, 2009 issue of the New Jersey Register, the Department has gone into great detail explaining how the existing amendments and new rules set forth "how intermittent leave will be calculated." There is no need to repeat that explanation here.

Regarding Ms. Mateo's second remark, the proposed *N.J.A.C. 12:21-3.5(e)* states that when an employer requires the claimant to use paid sick leave, paid vacation time or other leave at full pay under subsection (c), 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 subsection (c) and which has been paid by the employer to the claimant during the period of family leave. The Department is confident that the "reasonable and practicable time" standard is sufficient to protect against any unnecessary delay by the employer in submitting its request. The adoption of this standard is well within the Department's discretion. The Department declines to make the change suggested by the commenter. (emphasis added)

Regarding Ms. Mateo's final remark in this set of remarks, the Department could not disagree more. *N.J.A.C. 12:21-3.5* makes abundantly clear that reduction in entitlement to family leave insurance may not exceed two weeks, regardless of the amount of paid leave taken under the employer's policies.

COMMENT: Ms. Mateo suggest the addition of an entirely new section to *N.J.A.C. 12:21* entitled, "rights and responsibilities notice," in which she suggests that employer be required to provide written notice including the following: "(a) whether the employee's job is protected under the FLA or FMLA, (b) that the leave may be designated and counted against the employee's annual FMLA or FLA leave entitlement if qualifying and applicable, (c) whether the employer will require the employee to substitute paid time off pursuant to [*N.J.A.C.] 12:21-3.5(c)*, (d) whether the employer will permit the employee to substitute paid time off pursuant to [*N.J.A.C.] 12:21-3.5(d)* and the conditions related to any substitution, (e) any requirements and obligations related to mandatory retirement payments, union dues, medical contributions, etc., while the employee may be out on leave and consequences of failure to make such payments on a timely basis ([that is,] the circumstances under which coverage may lapse); (needs more but not sure how to word)."

RESPONSE: As indicated in response to earlier comments, P.L. 2008, c. 17 and the amendments and new rules within *N.J.A.C. 12:15, 12:17* and 12:21 pertain to the payment of a monetary benefit, not with the administration of a

leave entitlement. Most, if not all, of the items listed in the commenter's suggested notice from employers to employees have nothing whatsoever to do with family leave insurance benefits. The Department intends to evaluate claims for family leave insurance benefits and pay those claims where eligibility has been established. The Department is not going to interfere in the employer-employee relationship on issues of leave administration, which issues belong properly within the purview either of employer policies, individual employment contracts, collective bargaining agreements, or leave laws, such as the FMLA and FLA. Where P.L. 2008, c. 17, establishes a statutory requirement relative to family leave insurance benefits and where it sets forth a consequence for non-compliance with that requirement, whether that consequence is to be suffered by the employer or the worker, the Department will act to enforce the requirement and will issue a formal determination when necessary.

COMMENT: Ms. Mateo takes issue with proposed *N.J.A.C. 12:21-3.7* (Notice from claimant to the employer). She states that, "LSNJ believes this regulation requires further clarification and recommends that it be amended to be consistent with notice requirements of other leave laws." Ms. Mateo does not indicate to which "other leave laws" she is referring, nor does she set forth the "notice requirements" of these other leave laws. Ms. Mateo indicates, further, that "we [LSNJ] also believe that an employee should not be penalized for their failure to properly notice the employer of leave where the employer themselves have not complied with the notice requirements mandated by the law." Again, Ms. Mateo does not identify "the law" to which she is referring. Finally, Ms. Mateo recommends the addition of a new subsection (g) within proposed *N.J.A.C. 12:21-3.7*, which would, "clarify[] that an employee may change the designation of their leave."

RESPONSE: The commenter's suggestions erroneously use the phrase, "other leave laws." Again, P.L. 2008, c. 17 is not a leave law. Consequently, the imposition of notice requirements found within the FLA or FMLA would be wholly inappropriate in this context; that is, within the context of a benefits law. The notice requirements contained within proposed *N.J.A.C. 12:21-3.7* are taken from the enabling legislation, P.L. 2008, c. 17. The Department declines to make any of the changes on adoption suggested by the commenter.

COMMENT: Ms. Mateo suggests changes on adoption to proposed *N.J.A.C. 12:21-3.8* (Notice from the Division to the claimant and employer). Those changes include adding the word "timely" to the sentence within proposed *N.J.A.C. 12:21-3.8(a)*, "a claimant shall be given written notice of any decision . . ." Ms. Mateo also suggests adding language to *N.J.A.C. 12:21-3.8*, which states that any employer who fails to provide information to the Division upon request, will be found to have refused to provide reports deemed necessary for the administration of the family leave insurance benefits law and shall be subject to "the penalties set forth at []." (the commenter's remarks contain the empty brackets). Ms. Mateo suggests adding language stating that "whenever a determination is based upon information other than that supplied by an employer because the employer failed to respond, the initial determination and any subsequent determination thereunder shall be incontestable by the noncomplying employer." Ms. Mateo suggests adding language, which states that "except in the event of fraud, no refund liability shall be incurred by the claimant for any overpaid benefits resulting from information supplied on the notice which were paid prior to the receipt of the employer's subsequent response." Finally, Ms. Mateo suggests that *N.J.A.C. 12:21-3.8(a)* explicitly require that the notice from the Division to the claimant of any decision on his or her claim "clearly state all rights of appeal."

RESPONSE: Proposed *N.J.A.C. 12:21-3.8* is virtually identical to existing *N.J.A.C. 12:18-3.6*. The Department has explained in response to earlier comments its reason for modeling the rules for FLI benefits on its existing rules for TDI benefits. That same explanation applies to this commenter's remarks. Furthermore, the suggested changes to *N.J.A.C. 12:21-3.8(a)* would serve no meaningful purpose in that (1) the Department issues determinations as expeditiously as is possible under the given circumstances and adding the word "timely" would do nothing to hasten that process and (2) the Department already indicates appeal rights on all determinations (as a required element of due process). Regarding the remainder of the commenter's suggested changes, the commenter fails to identify the statutory authority for either the imposition of unspecified penalties, incontestable determination designations, or waivers of refund liabilities. The Department declines to make any of the changes on adoption suggested by the commenter.

COMMENT: Regarding proposed *N.J.A.C. 12:21-3.9* (Notice required from employers), Ms. Mateo states: It is not clear why the time frame in [subsection] (d) provides only two working days for the employer to provide information. Such a time frame is far too limited to give an employer the legitimate opportunity to prepare a response. This time frame should be expanded to five business days, with a statement clarifying that an employer's failure to provide information requested by the Division will preclude them from challenging in the future the Division's determination based upon the information before it. [Subsection] (e) is far too broad and is so open ended as to render the preceding paragraph nugatory. This allows an employer to send information to the Division at any time and simply state that it was "acquired" after the decision.

RESPONSE: As was explained in response to an earlier comment, *N.J.A.C. 12:21-3.9* (FLI; notice required from employers) is modeled on existing *N.J.A.C. 12:18-3.7* (TDI; notice required from employers). The time frames, including the two-working-day time frame, which appear within *N.J.A.C. 12:18-3.7* are contained within proposed *N.J.A.C. 12:21-*[page=1067] 3.9. *N.J.A.C. 12:18-3.7* has been existence for many years, without any apparent difficulties. As explained repeatedly, the Department is modeling its FLI procedures on its successful TDI procedures. The Department declines to make the changes on adoption suggested by the commenter.

COMMENT: Ms. Mateo suggests changing proposed *N.J.A.C. 12:21-3.13* on adoption. As proposed *N.J.A.C. 12:21-3.13* states the following: Unless the claimant, within seven calendar days after the delivery of a determination or notification thereof, or within 10 calendar days after such notification was mailed to his or her last known address, files an appeal from such determination, it shall be final and benefits shall be paid or denied in accordance therewith.

Ms. Mateo recommends adding the following: In any case in which the Division has determined that the individual has received benefits to which they were not entitled, the determination shall become final unless the individual files an appeal of the determination within 20 calendar days following the receipt of the notice, or, within 24 days after the notice was mailed to the individual's last known address. A late appeal shall be considered on its merits if it is determined that the appeal was delayed with good cause as defined in *N.J.A.C. 12:20-3.1*.

RESPONSE: The time frames for appeals set forth in proposed *N.J.A.C. 12:21-3.13* are identical to the time frames for appeals set forth in proposed *N.J.A.C. 12:18-3.8*. The Division intends to administer these two programs in the same manner and has no intention of providing different appeal rights to FLI claimants than are provided to TDI claimants. Moreover, even within FLI, there is no rational basis for providing the two sets of time limits for appeals suggested by the commenter. The Department declines to make the changes on adoption suggested by the commenter.

The following individuals testified at the November 3, 2008 public hearing:

1. Janet Hutton, Momsrising.org.

2. Atif Malik, Organizer, New Jersey Citizen Action, Newark, New Jersey.

3. Karen S. White, Director, Working Families Program, Center for Women and Work, Rutgers, The State University of New Jersey, on behalf of the NJ Time to Care Coalition.

4. John D. Rogers, Vice President, Human Resource Issues, New Jersey Business and Industry Association, Trenton, New Jersey.

5. Eric Richard, Legislative Affairs Director, New Jersey State AFL-CIO, Trenton, New Jersey.

6. Leah J. Walters, Legislative Director--Midatlantic Region, American Council of Life Insurers, Washington, D.C.

7. Peg Kinsell, Policy Director, Statewide Parent Advocacy Network, Inc., Newark, New Jersey.

8. Maretta Short, President of the National Organization for Women of New Jersey.

COMMENT: Ms. Hutton testified, generally, in support of the concept of family leave insurance benefits. She expressed concern, however, regarding the requirement within proposed *N.J.A.C. 12:21-3.4* that where a claimant files a "reestablished claim" to care for the same care recipient as in the initial claim, but where the claim is filed during or following employment with a different employer than for the most recent previous claim, that claimant must serve a waiting period.

RESPONSE: The Department's response to this comment is the same as its response to the identical comment submitted in writing by others and responded to earlier within this notice of adoption.

COMMENT: The comments of Mr. Malik during the public hearing addressed the same concerns raised by him in his written comments, summarized above.

RESPONSE: The Department's responses to the comments of Mr. Malik are identical to its responses to his written comments. Those responses are listed above.

COMMENT: The comments of Ms. White during the public hearing addressed the same concerns raised by her in her written comments, summarized above.

RESPONSE: The Department's responses to the comments of Ms. White are identical to its responses to her written comments. Those responses are listed above.

COMMENT: The comments of Mr. Rogers during the public hearing addressed the same concerns raised by him in his written comments, summarized above.

RESPONSE: The Department's responses to the comments of Mr. Rogers are identical to its responses to his written comments. Those responses are listed above.

COMMENT: The comments of Mr. Richard during the public hearing addressed the same concerns as raised by Mr. Wowkanech and Ms. Brennan in their written comments, summarized above, with two exceptions. Specifically, regarding those two exceptions, Mr. Richard raised concerns about the provisions within the proposed amendments and new rules pertaining to notice to workers and part-time concurrent employment. However, Mr. Wowkanech and Ms. Brennan indicated in their written comments, on behalf of the New Jersey State AFL-CIO, that they are withdrawing those particular comments.

RESPONSE: The Department's responses to the comments of Mr. Richard are identical to its responses to Mr. Wowkanech's and Ms. Brennan's written comments. Those responses are listed above.

COMMENT: The comments of Ms. Walters during the public hearing addressed the same concerns raised by her in her written comments, summarized above.

RESPONSE: The Department's responses to the comments of Ms. Walters are identical to its responses to her written comments. Those responses are listed above.

COMMENT: Ms. Kinsell's comments resembled the written comments submitted by Ms. Agoratus, on behalf of the Statewide Parent Advocacy Network, Inc., summarized above.

RESPONSE: The Department's responses to the comments of Ms. Kinsell are identical to its responses to Ms. Agoratus' written comments. Those responses are listed above.

COMMENT: Ms. Short testified, generally, in support of the concept of family leave insurance benefits and also in support of the proposed amendments and new rules.

RESPONSE: The Department thanks Ms. Short for her support.

Summary of Agency-Initiated Changes:

Upon review, the Department has determined that there is one item which was inadvertently not included among the list of items at *N.J.A.C. 12:21-2.29(a)*, *2.30(a)* and *2.31(a)*, which private plans must report on an annual basis to the Division of Temporary Disability Insurance. Specifically, as proposed, these three subsections fail to require private plans to report the average duration of family leave insurance benefits, in days, during the one-year period. The annual report, which the Department must issue and make available on an annual basis, pursuant to P.L. 2008, c. 17, section 13a, is required to include "the average duration of benefits." Consequently, the Department must add the requirement that private plans report to the Division of Temporary Disability Insurance on an annual basis, "the average duration of family leave insurance benefits, in days, during the one-year period," in order to enable the Department to produce the statutorily mandated annual report.

Federal Standards Statement

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

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 15

SCOPE

SUBCHAPTER 1. GENERAL PROVISIONS

12:15-1.1 Purpose and scope of rules and regulations

(a) Under the Unemployment Compensation Law and the Temporary Disability Benefits Law, benefits financed from tax or contributions are [page=1068] paid to eligible workers who become unemployed, disabled or who require leave from work to participate in the providing of care for a family member made necessary by a serious health condition of the family member or to bond with a newborn or newly adopted child.

(b) The unemployment benefits are paid from moneys contributed to a State Unemployment Compensation Fund, and both temporary disability benefits and family leave insurance benefits from moneys contributed to the State Disability Benefits Fund or from private plans approved by the Department of Labor and Workforce Development and established by employers for such purposes.

(c) The rules and regulations contained in this subchapter are agency statements of general applicability, and are intended to assist in the implementation of the basic provisions of the laws pertaining to unemployment compensation, temporary disability benefits and family leave insurance benefits.

12:15-1.1A Definitions

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

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

"Care" means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.

"Child" means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of the covered individual, or child of a civil union partner of the covered individual, who is less than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment.

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.

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

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

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

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

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

"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.

"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).

"Stepparent of the covered individual" means the person to whom the covered individual's biological parent is either currently married or with whom the covered individual's biological parent is currently sharing a civil union.

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

"Week" means a period of seven consecutive days.

12:15-1.2 Maximum weekly benefit rates

(a) (No change.)

(b) The maximum weekly benefit rate for State Plan temporary disability and family leave insurance benefits under the Temporary Disability Benefits Law is hereby promulgated as being $ 524.00 per week.

(c) These maximum benefits shall be effective for the calendar year 2008 on unemployment compensation benefit years and periods of disability and family leave commencing on or after January 1, 2008.

12:15-1.6 Alternative earnings test

In accordance with the provisions of *N.J.S.A. 43:21-4(e)(4)(B)* and *43:21-41(d)(2)*, in those instances in which the individual has not established 20 base weeks, the alternative earnings amount for establishing eligibility is hereby promulgated as being $ 7,200 for unemployment compensation benefit years and periods of disability and family leave commencing on or after January 1, 2007.

[page=1069] SUBCHAPTER 2. DISCLOSURE OF INFORMATION

12:15-2.3 Benefit appeal related information

Any request for the release of information connected with the proper presentation of an unemployment, [or] temporary disability benefits or family leave insurance benefits claim before the Appeal Tribunal or the Board of Review shall be considered in accordance with *N.J.A.C. 1:12-10.1*.

SUBCHAPTER 22. CLAIMS FOR FAMILY LEAVE INSURANCE BENEFITS DURING UNEMPLOYMENT

12:17-22.1 Definitions

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

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

"Care" means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.

"Care giver" means the family member who is providing the required care. This term is used interchangeably with "claimant."

"Care recipient" means the family member who is receiving care for a serious health condition or the newborn child or newly adopted child 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.

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.

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

"Covered individual" or "employee" means any individual who is in employment, as the term "employment" is defined at *N.J.S.A. 43:21-19(i)(1)* or any individual who has been out of such employment for less than two weeks.

"Director" means the Director of the Division of Temporary Disability Insurance in the Department of Labor and Workforce Development.

"Division" means the Division of Temporary Disability Insurance in the Department of Labor and Workforce Development.

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

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

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

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

"Family Temporary Disability Leave Account" means a separate account within the State Disability Benefits Fund into which is deposited all worker contributions collected under *N.J.S.A. 43:21-7(d)(1)(G)(ii)*.

"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.

"Licensed medical practitioner" means a licensed physician, dentist, optometrist, podiatrist, practicing psychologist, advanced practice nurse or chiropractor.

"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.

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

"Serious health condition" means an illness, injury, impairment, or physical or mental condition, which requires:

1. Inpatient care in a hospital, hospice, or residential medical care facility; or

2. Continuing medical treatment or continuing supervision by a health care provider.

As used in this definition, "continuing medical treatment or continuing supervision by a health care provider" means:

1. A period of incapacity (that is, inability to work, attend school or perform regular daily activities due to a serious health condition, treatment therefore and recovery therefrom) of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

i. Treatment two or more times by a health care provider; or

ii. Treatment by a health care provider on one occasion, which results in a regimen of continuing treatment under the supervision of a health care provider;

2. Any period of incapacity due to pregnancy, or for prenatal care;

3. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition;

4. A period of incapacity, which is permanent or long-term, due to a condition for which treatment may not be effective (such as Alzheimer's disease, a severe stroke or the terminal stages of a disease) where the individual is under continuing supervision of, but need not be receiving active treatment by a health care provider; or

5. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity or more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy) or kidney disease (dialysis).

"Stepparent of the covered individual" means the person to whom the covered individual's biological parent is either currently married or with whom the covered individual's biological parent is currently sharing a civil union.

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

[page=1070]"Week" means a period of seven consecutive days.

12:17-22.2 Notice and proof of family leave

(a) A written notice of family leave on which a claim for family leave insurance benefits during unemployment is based shall, within 30 days after the commencement of the period of family leave for which benefits are claimed, be furnished to the Division of Temporary Disability Insurance within the Department of Labor and Workforce Development by the claimant or an authorized representative. The notice shall state the claimant's full name, address and Social Security Number, as well as the date on which the claimant was unable to work due to the need to participate in the providing of care for a family member of the claimant 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 claimant or the domestic partner or civil union partner of the claimant, is a biological parent of the child, or the first 12 months after the placement of the child for adoption with the individual. The filing of Form FL-1 (Proof and claim for family leave insurance benefits) shall constitute notice of family leave.

(b) Proof of family leave on which a claim for benefits under the family leave insurance benefits during unemployment program is based shall be furnished by any claimant who expects to be unable to work due to the need to participate in the providing of care for a family member of the claimant 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 claimant or the domestic partner or civil union partner of the claimant, is a biological parent of the child, or the first 12 months after the placement of the child for adoption with the individual. Such proof may also be furnished by the claimant's authorized representative. When requested by the Division, additional certification from a health care provider or licensed medical practitioner shall be filed as proof of continued need to participate in the providing of care for a family member of the claimant made necessary by a serious health condition of the family member.

(c) The failure to furnish written notice of or proof of family leave within the 30-day time period required by (a) above shall not invalidate or reduce any claim, if the Division determines that there was good cause for late filing. If a notice or proof is furnished after 30 days and the claimant does not have good cause for failing to submit the notice of proof in a timely manner, the claim shall be reduced and limited to the period commencing 30 days prior to the receipt or postmark of the notice of proof of family leave, subject to the waiting period requirement. For purposes of this subsection, "good cause" means any situation over which the claimant did not have control and which was so compelling as to prevent the claimant from filing his or her claim within the prescribed period.

12:17-22.3 Procedures for filing of claims for benefits

(a) All claims and other required documents relating to a claim for family leave insurance benefits during unemployment may be filed by mail, except in those cases where the claimant is notified by the Division of Temporary Disability Insurance that a personal appearance or examination will be required. Filing by mail shall be deemed complete as of the postmarked date unless the claimant can provide evidence of an earlier date of mailing.

(b) Family leave insurance benefits shall be payable to a claimant residing in another state or in Canada, provided he or she complies with the requirements of the Unemployment Compensation Law and this subchapter.

(c) If an independent medical examination of a care recipient is required, the Division shall authorize such examination to be made by a licensed medical practitioner. The payment of examination fees shall be consistent with those fees established in *N.J.A.C. 12:21-3.1(g)* concerning family leave insurance benefits examination fees.

(d) If a care recipient refuses to submit to an independent medical examination by a licensed medical practitioner designated by the Division of Temporary Disability Insurance, the claimant shall be disqualified from receiving all benefits for the period of family leave in question, except for benefits already paid.

12:17-22.4 Waiver of registration and reporting requirements

The giving of notice of family leave and the filing of proof of a claim for family leave insurance benefits during unemployment shall dispense with the requirements of N.J.A.C. 12:7-4 concerning registering for work and reporting to the Division of Temporary Disability Insurance for the period covered by the claim.

12:17-22.5 Payment of family leave insurance benefits during unemployment for individuals working for exempt employers

(a) This section provides that weeks and wages earned by an individual employed by an out-of-State employer or by the Federal government, shall be excluded from benefit calculations under the Family Leave Insurance Benefits During Unemployment Program.

(b) Where a claimant's most recent employing unit was not a covered employer, family leave insurance benefits during unemployment shall be paid to the individual under *N.J.S.A. 43:21-4(f)(2)*, provided the claimant has sufficient weeks and wages as a covered individual during the base year to establish a valid claim and is otherwise eligible.

(c) A claim for family leave insurance benefits during unemployment, which was previously established as a valid unemployment claim based wholly or in part on wages from employment that is not with a covered employer shall be redetermined. Eligibility for family leave insurance benefits during unemployment shall be based solely on wages earned as a covered individual during the base year to establish a valid claim for benefits.

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)*.

(b) Where, during a week of unemployment, an individual would be eligible for unemployment benefits except for his or her inability to work due to the need to participate in the providing of care for a family member of the claimant 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 claimant or the domestic partner or civil union partner of the claimant, is a biological parent of the child, or the first 12 months after the placement of the child for adoption with the individual, during a portion of such week, a claim for family leave insurance benefits during unemployment may be filed and benefits paid to such an individual, provided that he or she is otherwise eligible and any of the following conditions apply:

1. If the simultaneous benefit period occurs immediately prior to the family leave, the claimant must file a claim for family leave insurance benefits in accordance with N.J.A.C. 12:17-22.2; or

2. If the simultaneous benefit period occurs at the end of the family leave, the claimant must assert his or her ability to work by reporting to the Division during the calendar week that the family leave ends or in the calendar week immediately following.

12:17-22.7 Benefit determination

A claimant shall be given written notice of any determination on his or her claim and of the reason for any denial of his or her claim. A copy of the determination and the probable duration for which benefits will be paid, shall be mailed to the claimant. The claimant's appeal rights shall also be clearly stated on the determination.

12:17-22.8 Payment of family leave insurance benefits during unemployment

For each claimant who establishes entitlement to family leave insurance benefits during unemployment under *N.J.S.A. 43:21-4(f)(2)*, his or her claim shall be paid from the Family Temporary Disability Leave Account.

12:17-22.9 Reduction of benefits

An employee's maximum family leave insurance benefits entitlement under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant for a given 12-month period shall be reduced by the number of days of family leave insurance benefits that have been paid to the employee during that 12-month period under the State plan or a private plan.

[page=1071] CHAPTER 21

FAMILY LEAVE INSURANCE BENEFITS

SUBCHAPTER 1. GENERAL PROVISIONS

12:21-1.1 Purpose and scope

(a) The purpose of this chapter is to implement P.L. 2008, c. 17, which amends *N.J.S.A. 43:21-25* et seq., the Temporary Disability Benefits Law.

(b) P.L. 2008, c. 17 extends the temporary disability benefits program, so as to provide to covered individuals family leave insurance 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 bond with a newborn or newly adopted child.

(c) Neither P.L. 2008, c. 17, nor this chapter, establishes the right of a covered individual to take leave from work 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; that is, neither P.L. 2008, c. 17, nor this chapter, establishes the right of a covered individual to be restored to employment following a period of leave from work 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.

(d) Any reference within P.L. 2008, c. 17, or within this chapter, to "family leave" or "family temporary disability leave" does not create a new type of leave, but rather, pertains solely to the manner, pursuant to P.L. 2008, c. 17, in which an otherwise established type of leave must be taken by an individual in order for the individual to avoid conse-

quences under P.L. 2008, c. 17, which may include ineligibility for or a reduction of the individual's family leave insurance benefits.

(e) Any reference within P.L. 2008, c. 17, or within this chapter, to pre-conditions related to leave (for example, the requirement under P.L. 2008, c. 17, §12, with regard to family leave to bond with a newborn or newly adopted child that a covered individual must provide the employer with prior notice of the leave not less than 30 days before the leave commences) are solely referring to pre-conditions to the payment of full family leave insurance benefits (a monetary benefit). The potential consequence to a covered individual for failure to satisfy these pre-conditions related to leave would be limited solely to those sanctions that are expressly set forth within P.L. 2008, c. 17 and this chapter, which sanctions affect entitlement to family leave insurance benefits. Those sanctions should in no way affect entitlement to leave under the New Jersey Family Leave Act, *N.J.S.A. 34:11B-1* et seq., the Federal Family and Medical Leave Act, *29 U.S.C. §§2601* et seq., any other statutory leave program, a collective bargaining agreement or an individual employer policy.

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.

"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. "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.

"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 care giver(s). The development of this attachment or bond between child and care giver(s) requires being in one another's presence.

"Care" means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.

"Care giver" or "claimant" means the family member who is providing the required care.

"Care recipient" means the family member who is receiving care for a serious health condition or the newborn child or newly adopted child 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.

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.

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

"Claimant" means an individual who has filed a claim for family leave insurance benefits or who has notified the Division or the employer, nominee, designee, trustee, union, association of employees, insurer or organization paying benefits under a private plan that he or she expects to file such a claim.

"Commissioner" means the Commissioner of Labor and Workforce Development.

"Continued claim" means a claim for family leave insurance benefits filed subsequent to the first or reestablished claim, which claim is within the same 12-month period, for the same care recipient and during or following employment with the same employer. A continued claim shall include scheduled intermittent family leave and extensions of scheduled intermittent family leave.

"Covered individual" or "employee" means any individual who is in employment, as the term "employment" is defined at *N.J.S.A. 43:21-19(i)(1)* or any individual who has been out of such employment for less than two weeks.

"Director" means the Director of the Division of Temporary Disability Insurance in the Department of Labor and Workforce Development.

[page=1072]"Division" means the Division of Temporary Disability Insurance in the Department of Labor and Workforce Development.

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

"Employer" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or domestic or foreign corporation, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, who is an employer subject to the "Unemployment Compensation Law" (*N.J.S.A. 43:21-1* et seq.), including any governmental entity or instrumentality, which is an employer under *N.J.S.A. 43:21-19(h)(5)*, notwithstanding that the governmental entity or instrumentality has not elected to be a covered employer pursuant to *N.J.S.A. 43:21-27(a)(2)*.

"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.

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

"Family Temporary Disability Leave Account" means a separate account within the State Disability Benefits Fund into which is deposited all worker contributions collected under *N.J.S.A. 43:21-7(d)(1)(G)(ii)*.

"First claim" means the claim for family leave insurance benefits initially filed on a form prescribed by the Division, the filing of which claim begins the running of the 12-month period during which a claimant is entitled to the maximum family leave insurance benefit prescribed at *N.J.S.A. 43:21-38*.

"Fund" means the State Disability Benefits Fund, as set forth in *N.J.S.A. 43:21-46*.

"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.

"Insurer" means any insurance company duly authorized to do business in the State of New Jersey, employer acting as a self-insurer, nominee, designee, trustee, union, association of employees or organization, which has undertaken to pay benefits under a private plan.

"Intermittent family leave" means periods of non-consecutive leave taken within a 12-month period in intervals of not less than one day.

"Licensed medical practitioner" means a licensed physician, dentist, optometrist, podiatrist, practicing psychologist, advanced practice nurse or chiropractor.

"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.

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

"Reestablished claim" means a claim for family leave insurance benefits filed subsequent to a first claim within the same 12-month period, which claim is either a claim for a different care recipient or a claim during or following employment with a different employer.

"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).

"Stepparent of the covered individual" means the person to whom the covered individual's biological parent is either currently married or with whom the covered individual's biological parent is currently sharing a civil union.

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

"Waiting period" means the first seven consecutive days of a first claim or of a reestablished claim, during either of which no family leave 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.

"Week" means a period of seven consecutive days.

12:21-1.3 Service of papers

(a) Any and all written communications issued by the Division may be served personally or by registered or certified mail. A copy of the notice may be left at the principal office or place of business in New Jersey of the person required to be served.

(b) Such service shall constitute due notice.

(c) The verification by the individual who served the notice or the return post office receipt of the registered or certified mail shall be proof that notice was served.

12:21-1.4 Reimbursement of funds

If benefits have been paid in error to a claimant by one program (either the State plan, family leave insurance benefits during unemployment, or a private plan) for a period of family leave and the claimant is correctly entitled to benefits under another program (either [page=1073] the State plan, family leave insurance benefits during unemployment, or a private plan) for that same period of family leave, the Division may arrange for a reimbursement of funds between the two programs. If it is determined that the benefits were received as a result of the claimant's making a false statement

knowing it to be false or knowingly failing to disclose a material fact, the individual shall be subject to a fine and repayment of the overpaid amount under the provisions of *N.J.S.A. 43:21-55(a)*.

12:21-1.5 Completion of medical certifications by health care provider or licensed medical practitioner

No health care provider or licensed medical practitioner shall charge a claimant or care recipient a fee for services rendered in completing forms issued by the Division of Temporary Disability Insurance or by any insurer requesting medical information associated with the filing of any claim for payment of family leave insurance benefits.

12:21-1.6 Payment of benefits

(a) The Division (for State plan and family leave insurance benefits during unemployment) or the insurer (for private plan), shall make all family leave insurance benefit checks payable to the claimant, except under the following circumstances:

1. As prescribed under *N.J.S.A. 43:21-42(b)*, relative to the payment of benefits due a deceased claimant; or

2. As prescribed under *N.J.S.A. 43:21-42(c)*, relative to the payment of benefits due a minor.

(b) The Division (for State plan and family leave insurance benefits during unemployment) or the insurer (for private plan), shall deliver all family leave insurance benefit checks directly to the claimant, except under the circumstances set forth in (c) below.

(c) The Division (for State plan and family leave insurance during unemployment) or the insurer (for private plan), may deliver family leave insurance benefit checks to the employer, which family leave insurance benefit checks shall have been made payable to the claimant pursuant to (a) above, only when all of the following conditions have been met:

1. The employer has advanced moneys to the claimant in an amount equal to or in excess of the family leave insurance benefits to which the claimant is entitled under the State or private plan; and

2. The claimant has knowingly and voluntarily signed a written agreement authorizing the delivery of his or her family leave insurance benefit check to the employer.

12:21-1.7 Plan jurisdiction

Whether the claimant for a particular claim is covered by the State plan or a private plan shall be determined based on the coverage (State plan or private plan) provided by the current employer at the time the first or reestablished claim is filed or, where the claimant has become unemployed within the 14 days immediately preceding the claim, his or her most recent previous employer at the time the first or reestablished claim is filed.

12:21-1.8 Notice to workers

(a) Each employer shall post in each of the employer's worksites, in a place or places accessible to all employees at the worksite, a printed notification of covered individuals' rights relative to the receipt of family leave insurance benefits under P.L. 2008, c. 17 and this chapter.

(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:

1. Not later than *[(30 days following the effective date of this chapter)]* ***April 1, 2009***;

2. At the time of the employee's hiring;

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; and

4. At any time, upon the first request of the employee.

(c) The written notification under (b) above may be transmitted by the employer to the employee in electronic form.

(d) The notification poster referred to in (a) above and the written notification referred to in (b) above shall be made available by the Department to any employer upon request by the employer to the Department at the following address:
Department of Labor and Workforce Development
Office of Constituent Relations
P.O. Box 110
Trenton, New Jersey 08625-0110

SUBCHAPTER 2. PRIVATE PLANS

12:21-2.1 Extent of coverage

(a) All employees of the employer shall be covered by one or more private plans, without restrictions or exclusions, except that, subject to the approval of the Division, any private plan may exclude employees of a separate unit, craft, organization, plant, department or establishment, or other class or classes of employees. Application for such exclusion shall be submitted on a form and in a manner prescribed by the Director. The Division may not approve the exclusion of a class or classes of employees determined by the age, sex or race of the employees or by the wages paid such employees, if, in the opinion of the Division, such exclusion would result in a substantial selection of risk adverse to the State plan. For the purposes of this subsection, the employees of an employing unit (not a subject employer) performing services for an employer, as defined in *N.J.S.A. 43:21-19(g)* shall be considered a class of employees, which may be excluded.

(b) Employees excluded from a private plan shall be covered under the State plan and the employer shall be liable for the deduction and payment of workers' contributions, as required by *N.J.S.A. 43:21-7*.

(c) All proposed private plans shall be submitted for review and approval by the Division. An employer failing to secure the approval of a private plan shall be deemed to be covered under the State plan and the employer shall be liable for the deduction of workers' contributions and payments of workers' contributions to the Fund as required by *N.J.S.A. 43:21-7* until such date as a private plan is effective.

(d) An employee who ceases to be covered by a private plan, whether by termination of the plan, changing employers or for any other reason, shall, if otherwise eligible, become entitled to family leave insurance benefits from the Fund.

(e) The responsibility for coverage shall be established by the covered individual's last employer. The application for benefits shall be processed by the insurer, if the employer has an approved private plan and the individual is covered by that plan, or by the State plan if the employer has State plan coverage. However, claims coming within the purview of *N.J.A.C. 12:21-2.10* or *3.6* shall be governed thereby.

12:21-2.2 Benefits

(a) An employee shall not be entitled to any benefits from the Fund with respect to any period of family leave commencing while he or she is covered under a private plan.

(b) An employee shall not be paid any benefits for family leave insurance benefits during unemployment, *N.J.S.A. 43:21-3* and 4, for any period of family leave commencing while he or she is a "covered individual" as defined in *N.J.S.A. 43:21-27(b)(2)*.

(c) The benefits provided by a private plan shall be set forth in the plan both as to eligibility requirements and amounts payable.

(d) If application for benefits is made under the State plan or family leave insurance benefits during unemployment and it is determined that the claim should have been made under a private plan, an employee shall not be deprived of benefits under the private plan for failure to file a timely claim for benefits provided that:

1. The application to the State plan would have constituted a timely filed claim to the private plan if it had been then made; and

2. Proof of entitlement to family leave insurance benefits is furnished under such private plan within the period required therein or within 30 days after the employee has notice that the claim should have been made under the private plan.

(e) If an employee is overpaid benefits under a private plan, the amount of such overpayment shall not be deducted from the amount of benefits to which he or she may be entitled under the State plan or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant for a subsequent period of family leave. If an employee is overpaid benefits under the State plan, the amount of such overpayment shall not be deducted from the amount of benefits to which he or she may be entitled under a private [page=1074] plan, or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant for a subsequent period of family leave.

(f) An employee's maximum family leave insurance benefit entitlement under a private plan for a given 12-month period shall be reduced by the number of days of family leave insurance benefits that have been paid to the employee during that 12-month period under the State plan or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant.

(g) If the benefits claimed by an employee under a private plan are denied, such denial shall be by a written notice to the employee, giving the reason therefor and stating the employee's appeal rights as provided under *N.J.A.C. 12:18-2.6* and 1:12A. Upon the issuance of such notice, the Division shall be immediately furnished with a copy of the claim and the notice of denial, or facsimiles thereof.

(h) The private plan shall provide for payment of benefits to employees weekly, biweekly, or at such intervals as the employee is customarily paid wages, unless otherwise approved by the Director.

(i) No reduction in the amount or duration of benefits or increase in the rate of employee contributions shall be made without prior approval of the Division. Approval shall be given if the Division finds that the plan, after such modification, continues to meet the requirements of the Act and this chapter and, if the employees are to contribute toward the cost of such modified plan, that a majority of the employees covered by the plan have agreed to the modification by written election (by ballot or otherwise) in accordance with this chapter.

1. The Division shall be given prompt notice of any change to a private plan, which change does not affect nor alter the provisions of the plan, and, therefore, does not require approval under this section.

12:21-2.3 Proof of coverage

Notice, in a form approved by the Director, of the benefits provided by the private plan shall be furnished to the covered employees either by individual certificates or other direct written notification at the time of coverage, or by conspicuous and continuing posting at the place of employment. This notice shall reflect current rates, eligibility requirements, benefit entitlements, and appeal rights to the Division as specified in *N.J.A.C. 12:21-2.6*. This notice shall be available for inspection at the work site. A copy of the notice shall be submitted annually to the Division.

12:21-2.4 Choice of health care provider

(a) A care recipient whose care giver is covered under a private plan shall have the right to choose his or her own health care provider. The care giver shall, if requested by the private plan insurer, have the care recipient submit to an examination by a licensed medical practitioner designated by the private plan insurer. The examinations shall not be more frequent than once a week, shall be made without cost to the care giver or care recipient and shall be held at a reasonable time and place. Refusal by the care recipient to submit to an examination shall disqualify the care giver from all benefits for the period of family leave in question, except from benefits already paid.

(b) Where a care recipient has utilized a health care provider, and that health care provider has examined the care recipient and has diagnosed him or her with a serious health condition, the insurer paying benefits may only deny benefits to the care giver during that period so certified where:

1. The insurer paying benefits has contacted the care recipient's health care provider and has reached a mutual agreement therewith as to a change in the period of either the care recipient's serious health condition or care required by the care giver;

2. A licensed medical practitioner designated by the insurer paying benefits has examined the care recipient and has determined that the care recipient either no longer has a serious health condition or requires care by the care giver. Where such a determination has been made, benefits shall not be paid beyond the date of the examination;

3. A care recipient refuses to submit to or fails to attend an examination conducted by a licensed medical practitioner designated by the insurer paying benefits, in which case the care giver shall be disqualified from receiving all benefits for the period of family leave in question, except as to benefits already paid; or

4. The insurer paying benefits has obtained credible factual evidence showing that the care recipient is performing activities that demonstrate a serious health condition does not exist. In such instances, benefits shall not be paid beyond the date that such factual evidence is obtained.

12:21-2.5 Nonprofit provision

No employer, union or association representing employees and no person acting in behalf of any of the foregoing shall so administer or apply the provisions of a private plan as to derive any profit therefrom.

12:21-2.6 Appeals

(a) The appeal procedures for private plan family leave insurance cases are found at *N.J.A.C. 1:12A* and at the *N.J.A.C. 12:18* Appendix.

(b) If a claimant covered under a private plan is denied benefits by the insurer for any period of family leave or he or she disagrees with a determination of benefits made by the insurer, he or she has the right to appeal the determination or denial.

(c) The appeal or complaint shall be filed with the Division within one year after the beginning of the period for which benefits are claimed. Such appeal or complaint shall be filed, either personally or by mail, by the claimant or his or her representative. A late appeal shall be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause exists in circumstances where it is shown that:

1. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

2. The appellant delayed filing the appeal for circumstances that could not have been reasonably foreseen or prevented.

(d) Any appeal or complaint by a claimant claiming benefits under an approved private plan shall be filed on a form and in a manner prescribed by the Director. The claimant must include the reasons for the appeal or complaint and explain why he or she disagrees with the determination or denial of benefits on the form.

(e) Upon receipt of such appeal or complaint, the Division shall conduct an investigation and such informal conferences as it may deem necessary to determine the facts and settle the issues.

(f) Any appeal or complaint shall be deemed filed on the day it is delivered to the office of the Division of Temporary Disability Insurance, Labor and Workforce Development Building, PO Box 957, John Fitch Plaza, Trenton, New Jersey 08625-0957, or if mailed, the complaint shall be deemed filed on the postmarked date appearing on the envelope in which the complaint is mailed; provided, postage is prepaid and the envelope is properly addressed.

12:21-2.7 Review

(a) All approved private plans shall be reviewed by the Division during their continuance to insure compliance with the law and regulations thereunder.

(b) Where a decision to accept or deny a claim is not made within 45 days of filing of claim, the insurer shall notify the Division of such fact giving the reasons therefor.

12:21-2.8 Application for approval

(a) An employer desiring to establish a private plan for the payment of family leave insurance benefits to employees shall file an application on a form and in a manner prescribed by the Director. In requesting the form, the employer shall inform the Division whether the family leave insurance benefits will be provided by a contract of insurance, or by an agreement between the employer and a union or association representing the employees or by the employer as a self-insurer.

(b) If two or more employers desire to have their private plans insured by a single policy of insurance, either by mutual agreement or by agreement as set forth in (a) above, each shall file an application for approval on a form and in a manner prescribed by the Director, designating a nominee, designee, trustee or one of them as the duly authorized agent for the purposes of the Act.

(c) All documents required by the Division for the completion of the approval process shall be submitted within 90 days of the date the application is received. A new application shall be filed if all such documents are not received within 90 days unless the employer can demonstrate good cause for the delay. For the purposes of this section, "good cause" means any situation over which the employer did not have control and which was so compelling as to prevent the employer from submitting the documents as required by the Division.

[page=1075] (d) An application submitted for approval of a private plan shall bear the signature of an authorized representative of the insuring organization, if the private plan is to be insured by an admitted insurer or union welfare fund and:

1. A corporate officer if the employer is a corporation;

2. The owner if the employer is an individual; or

3. A partner if the employer is a partnership.

12:21-2.9 Minimum plan requirements

(a) Each private plan, in order to secure Division approval, shall provide to the employees covered thereby, rights equal at least to those set forth in *N.J.S.A. 43:21-37* to *43:21-42* inclusive, by assuring that:

1. The private plan shall cover all employees, except as provided elsewhere in this chapter, for benefits during any family leave commencing while the plan is in effect;

2. Eligibility requirements for family leave insurance benefits shall be no more restrictive than those requirements for benefits payable under the State plan; and

3. Except as provided for in *N.J.A.C. 12:21-2.10*, the family leave insurance benefits payable to each employee covered thereunder shall be at least equal, in both weekly amount and duration, to those which would be payable to the employee under the State plan, but for his or her inclusion in the private plan.

(b) An employer may provide family leave insurance benefits through a plan established solely for the administration of benefits required pursuant to the Temporary Disability Benefits Law, *N.J.S.A. 43:21-25* et seq., or through a multi-benefit plan; provided, however, that, if the multi-benefit plan does not comply with all of the provisions of the New

Jersey Temporary Disability Benefits Law, the employer shall establish a separate plan, maintained solely for the purpose of complying with the provisions of the law.

12:21-2.10 Concurrent coverage

(a) A private plan shall not preclude simultaneous or concurrent coverage by reason of an individual's employment with two or more employers. Such employee shall receive not less than the benefits payable under the State plan both as to benefit amount and duration.

(b) A covered individual is in "concurrent employment" if he or she is in employment with two or more employers during the last calendar day of employment immediately preceding the period of family leave. The term "concurrent employers" means the covered employers with whom an employee was employed on the last day of employment.

(c) If an employee is in concurrent employment and only one employer has a private plan, then the employee shall be entitled to receive benefits under that private plan, if otherwise eligible. Such benefits shall not be less than he or she would be eligible to receive under the State plan with respect to all employment, if he or she were covered under the State plan. No benefits shall be payable under the State plan for family leave commencing while he or she is covered under such private plan.

(d) If an employee is in concurrent employment with two or more employers and more than one employer has a private plan, the employee shall be entitled to receive benefits under each private plan, if otherwise eligible. Each private plan shall pay not less than the full amount the employee would be eligible to receive if covered under the State plan. When determining the amount to be paid, the private plan may take into account coverage under other private plans and benefits may be apportioned among the plans in the same proportion that the employee earned wages with each employer in the last eight calendar weeks immediately preceding the period of family leave. In no event shall the employee receive less than the benefits to which he or she would be entitled under the most favorable plan, both as to weekly amount and duration.

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.

12:21-2.12 Evidence of consent

(a) 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) The results of such election shall be posted promptly and the records pertaining thereto shall be maintained by the employer and be available for inspection by Division representatives during the existence of the private plan.

12:21-2.13 Certificate of approval; effective date

(a) The Division shall issue a "Certificate of Approval of Private Plan," which shall constitute evidence of approval of the plan by the Division.

(b) Each such private plan shall be submitted in detail to the Division and shall be approved by the Division to take effect as of the first day of the calendar quarter next following the submission date, or as of an earlier date if requested by

the employer and approved by the Division. Grounds for approval of an earlier effective date include, but are not limited to, whether the plan:

1. Is the result of an agreement contained in a labor-management contract; or

2. Covers a newly formed subsidiary of an employer with an existing private plan; or

3. Is the result of a succession from an employer with an existing private plan. As provided in *N.J.S.A. 43:21-7(c)(7)(A)*, a successor in interest is an entity that acquires the organization, trade, or business, or substantially all the assets of an employer, whether by merger, consolidation, sale, transfer, descent, or otherwise.

(c) Approved contributory plans must remain in effect through at least December 31, 2009.

12:21-2.14 Withdrawal of certificate of approval

(a) A certificate of approval may be withdrawn or revoked upon notice and opportunity for hearing if the Division finds:

1. That there is danger that benefits accrued or to accrue will not be paid;

2. That the security for such payment is insufficient;

3. That there has been a failure to comply with the terms and conditions of the plan;

4. That there has been a failure to pay benefits to eligible claimants promptly;

5. That, in the case of an insured private plan, the insurance company has given notice of the cancellation of the policy of insurance thereunder;

6. That the employer, his or her duly authorized agent, the union or association representing the employees or any person acting in behalf of any of the foregoing are deriving a profit in instituting or administering the plan;

7. That the employer, or insurer or any other party responsible for the payment of benefits, as the case may be, has failed to comply with the Act and regulations; or

8. Other good cause.

(b) A certificate of approval may be withdrawn or revoked effective as of the date of the occurrence of the condition, violation, event or omission forming the basis for such withdrawal or revocation, or at any subsequent date which in the judgment of the Director or his or her authorized representative, shall be necessary for the protection of the benefit rights of the employees covered by the plan. The Division shall give the employer, the insurer or organization paying benefits, and all interested parties notice of revocation or withdrawal of the certificate of approval and an opportunity for a hearing.

12:21-2.15 Termination on petition by employees

Upon receipt by the Division of a petition to terminate a private plan, signed by not less than 10 percent of the employees covered by the private plan, the Division shall order an election, after 30 days' written [page=1076] notice to the employer. No such election shall be required more often than once in any 12 consecutive months. The Division shall, whenever it deems necessary, supervise such election.

12:21-2.16 Eligibility to petition

(a) An employee, to be eligible to sign any petition requesting an election to discontinue a private plan, shall be in the employ of the employer as of the date of the petition, and covered by the plan. The form of the petition requesting an election shall be prescribed by the Director.

(b) An employee, to be eligible to vote in any election to discontinue a private plan, shall be in the employ of the employer as of the date of the election and covered by the plan.

12:21-2.17 Requirements of election

(a) Any election to discontinue a private plan shall be in accordance with this subchapter. The election shall be by written ballot but the Director may order a secret ballot if the facts so warrant. The ballot shall be so worded as to give each employee voting an opportunity to vote for or against the discontinuance of the private plan. The time and place of the election shall be convenient to employees, and on not less than 30 days' written notice by the employer to the employees. The notice of the election and the results thereof shall be given to the employees affected by one of the following methods, by:

1. Posting on bulletin boards in the employer's establishment or place of business for a period of not less than 30 days;

2. Mail addressed to each employee; or

3. Personal service.

(b) A record of the method used shall be kept by the employer.

12:21-2.18 Retention of election records

The records pertaining to any election to discontinue a private plan shall be retained by the employer and shall be available for inspection by the Division representatives for a one-year period from the date of termination.

12:21-2.19 Certification of election results

A statement shall be submitted forthwith by the employer to the Division showing the total number of employees eligible to vote, and the number of employees who voted for and against termination of the plan.

12:21-2.20 Discontinuance

(a) As provided in the Act, a private plan shall be discontinued when the Division withdraws its approval thereof upon being furnished satisfactory evidence that a majority of the covered employees have made election in writing to discontinue such plan.

(b) An employer may discontinue a private plan upon proper notice to the Division and to the covered employees.

12:21-2.21 Responsibility of employer on withdrawal of certificate of approval

(a) The employer shall be liable for the deduction of workers' contributions and payment of workers' contributions, as required by *N.J.S.A. 43:21-7*, with respect to wages paid for employment subsequent to the effective date of withdrawal or revocation of the certificate of approval, unless the Division has approved another private plan to become effective on the day immediately following.

(b) Form FDP-22, Notice of Withdrawal of Approval of Family Leave Insurance Benefits Private Plan, shall be conspicuously posted for a period of not less than 30 days at or in the employer's factory, establishment or other premises at which the workers, who were covered under the private plan, are employed, as evidence of the termination of that plan.

12:21-2.22 Insurer liability

(a) A policy of insurance providing for the payment of benefits under a private plan shall provide that the insurer shall remain liable for the payment of benefits to any employee covered by the policy and the private plan for any period of

family leave commencing, during the continuance of the private plan, after the policy became effective and prior to the termination of the policy.

1. With respect to a period of family leave immediately after the individual has a period of disability during the individual's own disability, the period of disability is deemed, for the purposes of determining whether the period of disability commenced prior to the date of termination, to have commenced at the beginning of the period of disability during the individual's own disability, not the period of family leave.

(b) At least 60 days' notice shall be given to the Division by the insurer or the policyholder before termination of the policy becomes effective, except that, if the policy is being terminated by reason of a change of insurer, this requirement may be waived.

(c) If a policy is being terminated for nonpayment of premium, at least 15 days' written notice shall be given to the Division before termination of the policy becomes effective.

12:21-2.23 Mandatory provision

Each contract of insurance providing for the payment of benefits under a private plan shall contain a clause or clauses guaranteeing that the benefits meet the requirements of *N.J.A.C. 12:21-2.9*, Minimum plan requirements.

12:21-2.24 Security required

(a) The security required by the Division from an employer whose private plan does not provide for the assumption of the liability to pay benefits by an insurer, duly authorized and admitted to do business in this State, shall be in the form of a cash deposit, a bond of an admitted surety insurer conditioned on the payment of obligations under the plan, or bearer bonds issued or guaranteed by the United States of America or issued by this State, the amount to be determined by the Division upon the basis of the size of the payroll, the class or classes of risks contemplated, the financial standing of the employer and any additional factors, which the Division may deem proper.

(b) The amount shall not be less than one-half of the contributions that would have been paid by the employees to be covered by the private plan during the previous year, or one-half of the estimated contributions of such employees for the ensuing year, whichever is greater.

12:21-2.25 Security exemption

(a) Exemption from the requirement of *N.J.A.C. 12:21-2.24*, Security required, shall be granted to any employer who:

1. Is exempt from insuring the employer's workers' compensation liability, as provided by law; or

2. Satisfies the Division as to the employer's financial responsibility to pay the benefits provided by the employer's plan by furnishing a complete, current financial statement and such other proof as may be acceptable to the Division. An annual review of the financial responsibility will be made.

12:21-2.26 Disposition of security upon termination

(a) The security provided for in this subchapter should be applied by the Division to the payment of any unpaid obligations under the private plan. Upon termination of a private plan, which does not provide for the assumption by an admitted insurer of the liability to pay benefits, or upon withdrawal of approval of such private plan, the Division shall retain the security deposited, for the purpose of securing the payment of the obligations of the private plan. Upon the expiration of all benefit claims outstanding after the lapse of five complete calendar quarters following the effective date of termination or withdrawal of approval, the Division shall make a final assessment of the charges against the employer as provided in the Act and this subchapter.

(b) The Division may make a partial return of the security at an earlier date if it finds that such security is in excess of that required.

12:21-2.27 Exchange of information

(a) If an employee's weekly benefit amount, determined under the benefit provisions of an employer's private plan, with respect to any period of family leave, is less than the maximum weekly benefit amount payable under the State plan, and such weekly benefit amount has been computed on a basis different from that provided for covered individuals under the State plan, the weekly benefit amount shall be recomputed in accordance with the provisions of the New Jersey Temporary Disability Benefit Law, *N.J.S.A. 43:21-40*, as amended.

(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 [page=1077] 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, 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 immediately preceding the calendar week in which the employee's family leave commenced.

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

1. The name, address and Social Security Number of the employee;

2. The date on which the family leave commenced;

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, as may be necessary to determine all wages earned in the required eight base weeks; and

4. The weekly earnings of the employee from the employer during each of the calendar weeks in the 52 calendar weeks immediately preceding the family leave, 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 preceding the week in which his or her period of family leave commenced 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. The name, address and Social Security Number of the employee;

2. The date on which the family leave commenced;

3. The names and addresses of such other employers, from whom the employee alleges to have earned wages in the 52 calendar weeks immediately preceding his or her family leave, as may be necessary to determine the required number of base weeks; and

4. The number of calendar weeks in the 52 calendar weeks immediately preceding the calendar week in which the period of family leave commenced, during which the employee earned not less than the minimum base week requirement as defined in *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 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. The name, address and Social Security Number of the employee;

2. The date on which the family leave commenced;

3. Names and addresses of other employers in the 52 weeks prior to the week in which the family leave occurred;

4. Total amount of wages earned by claimant with the most recent employer.

12:21-2.28 Notice from employers

Within 10 days after the mailing of a request for information with respect to a period of family leave, each employer having a private plan shall furnish the Division with any information requested or known to the employer, which may bear upon the eligibility of the claimant.

12:21-2.29 Reports by self-insurers

(a) For the one-year period ending December 31 of each calendar year during which a self-insured private plan is in effect, each employer shall, on a form prescribed by the Division, file a statement, on or before the 30th day following the end of the one-year period, showing the following information with regard to each of the following types of claims: care of sick child, care of sick spouse, care of sick domestic partner, care of sick civil union partner, care of sick parent, bonding by biological parent with a newborn child, bonding by domestic partner or civil union partner of biological parent with a newborn child, bonding by individual with newly adopted child:

1. The number of claims for family leave insurance benefits received during the one-year period;

2. The number of claims for family leave insurance benefits accepted during the one-year period;

3. The number of workers who received family leave insurance benefits during the one-year period;

4. The amount of family leave insurance benefits paid during the one-year period;

5. The average weekly family leave insurance benefit during the one-year period; *[and]*

6. The amount of sick leave, vacation leave or other fully paid time, which resulted in reduced benefit duration during the one-year period; *[and]*

7. With regard solely to family leave insurance benefit claims to care for sick family members, the amount of intermittent family leave insurance benefits paid during the one-year period*[.]***; and***

8. The average duration of family leave insurance benefits, in days, during the one-year period.

(b) The information reported under (a) above shall be broken down by sex and by age group, beginning at 25 years and under and increasing in increments of 10.

(c) On or before the 30th day following the close of each calendar year during which a self-insured private plan is in effect, the employer shall, on a form prescribed by the Division, file a report showing:

1. The amount of funds available at the beginning of that year for payment of family leave insurance benefits;

2. The amount contributed by workers during that year;

3. The direct cost of administration of the plan during that year;

4. The number of employees covered by the plan as of December 31; and

5. Such other information as the Division may require with respect to the financial ability of the self-insurer to meet the self-insured's obligations under the plan.

12:21-2.30 Reports by unions and other benefit payers

(a) For the one-year period ending December 31 of each calendar year, each union, association of employees, nominee, trustee or organization, which has assumed the liability to pay the family leave insurance benefits required under one or more private plans (which benefits are not guaranteed by a contract of insurance of an insurer duly authorized and admitted to do business in this State) shall, on a form prescribed by the Division, file a statement, on or before the 30th day following the end of the one-year period showing the following information with regard to each of the following types of claims: care of sick child, care of sick spouse, care of sick domestic partner, care of sick civil union partner, care of sick parent, bonding by biological parent with a newborn child, bonding by domestic partner or civil union partner of biological parent with a newborn child, bonding by individual with newly adopted child:

1. The number of claims for family leave insurance benefits received during the one-year period;

2. The number of claims for family leave insurance benefits accepted during the one-year period;

3. The number of workers who received family leave insurance benefits during the one-year period;

4. The amount of family leave insurance benefits paid during the one-year period;

5. The average weekly family leave insurance benefit during the one-year period;

6. The amount of sick leave, vacation leave or other fully paid time***,*** which resulted in reduced benefit duration during the one-year period; *[and]*

7. With regard solely to family leave insurance benefit claims to care for sick family members, the amount of intermittent family leave benefits paid during the one-year period*[.]****; and***

8. The average duration of family leave insurance benefits, in days, during the one-year period.

[page=1078] (b) The information reported under (a) above shall be broken down by sex and by age group, beginning at 25 years and under and increasing in increments of 10.

(c) On or before the 30th day following the close of each calendar year each union, association of employees, nominee, trustee or organization, which has assumed the liability to pay the family leave insurance benefits required under one or more private plans (which benefits are not guaranteed by a contract of insurance of an insurer duly authorized and admitted to do business in this State) shall, on a form prescribed by the Division, file a report showing:

1. The amount of funds available at the beginning of that year for payment of family leave insurance benefits;

2. The amount contributed by workers during that year;

3. The direct cost of administration of the plan during that year;

4. The number of employees covered by the plan as of December 31; and

5. Such other information as the Division may require with respect to the financial ability of the self-insurer to meet the self-insured's obligations under the plan.

12:21-2.31 Reports by insurance companies

(a) For the one-year period ending December 31 of each calendar year, each insurance company, which has assumed the liability to pay the family leave insurance benefits required under one or more private plans shall, on a form prescribed by the Division, file a statement, on or before the 30th day following the end of the one-year period showing the following information with regard to each of the following types of claims: care of sick child, care of sick spouse, care of sick domestic partner, care of sick civil union partner, care of sick parent, bonding by biological parent with a newborn child, bonding by domestic partner or civil union partner of biological parent with a newborn child, bonding by individual with newly adopted child:

1. The number of claims for family leave insurance benefits received during the one-year period;

2. The number of claims for family leave insurance benefits accepted during the one-year period;

3. The number of workers who received family leave insurance benefits during the one-year period;

4. The amount of family leave insurance benefits paid during the one-year period;

5. The average weekly family leave insurance benefit during the one-year period;

6. The amount of sick leave, vacation leave or other fully paid time***,*** which resulted in reduced benefit duration during the one-year period; *[and]*

7. With regard solely to family leave insurance benefit claims to care for sick family members, the amount of intermittent family leave benefits paid during the one-year period*[.]****; and***

8. The average duration of family leave insurance benefits, in days, during the one-year period.

(b) The information reported under (a) above shall be broken down by sex and by age group, beginning at 25 years and under and increasing in increments of 10.

(c) On or before the 30th day following the close of each calendar year each insurance company, which has assumed the liability to pay the family leave insurance benefits required under one or more private plans shall, on a form prescribed by the Division, file a report showing:

1. The amount of funds available at the beginning of that year for payment of family leave insurance benefits;

2. The amount contributed by workers during that year;

3. The direct cost of administration of the plan during that year;

4. The number of employees covered by the plan as of December 31; and

5. Such other information as the Division may require with respect to the financial ability of the self-insurer to meet the self-insured's obligations under the plan.

12:21-2.32 Reports by employers having two or more plans

On or before the 30th day following the close of each calendar year, each employer having two or more approved private plans in effect during such calendar year or any portion thereof shall, on a form prescribed by the Division, file a report showing the amount of taxable wages paid during such calendar year to employees while covered under each such private plan.

12:21-2.33 Continuation of plan on successor employer

(a) If there is a change in the employer and the successor employer assumes the obligations and liability of the predecessor under the plan, the plan shall be transferred to the successor, if:

1. The workers to be covered by the plan immediately after the succession are not required to contribute to the cost of the plan;

2. The class or classes of workers covered by the plan immediately prior to the succession constitute a majority of the workers in the same class or classes employed by the successor immediately after the succession;

3. A majority of the workers in the class or classes covered by the plan in the employ of the successor immediately after the succession give their written consent to the plan; or

4. The plan is limited to the separate unit, plant, department or establishment operated by the predecessor and the provisions of (a)1, 2 or 3 above, are met with respect to such separate unit, plant, department or establishment.

12:21-2.34 Employee contributions to private plans

(a) Employee contributions to a private plan shall be deposited in a trust fund account and shall not be part of an employer's assets.

(b) Trust fund assets deposited by an employer as required under (a) above shall be used only for the administration and payment of family leave insurance benefits.

(c) Employers shall make trust fund accounts available for periodic inspection and audit by the Division at the discretion of the Director.

(d) Upon termination of a contributory private plan for family leave insurance benefits, excess contributions remaining in the trust account shall, after five completed calendar quarters, be remitted to the Division for deposit in the Fund.

SUBCHAPTER 3. STATE PLAN

12:21-3.1 Extent of coverage

(a) A claimant shall not be entitled to any benefits from the Fund with respect to any period of family leave commencing while he or she is covered under a private plan.

(b) A claimant shall not be paid any benefits under *N.J.S.A. 43:21-3* and 4 for any period of family leave commencing while he or she is a "covered individual" as defined in *N.J.S.A. 43:21-27(b)(2)*.

(c) An individual who is covered by a private plan or is separated from his or her employment for a period of two weeks or more immediately prior to the family leave shall not be entitled to any benefits under the State plan.

(d) If application for benefits is made under a private plan or for family leave insurance benefits during unemployment, *N.J.S.A. 43:21-4*, and it is determined that the claim should have been made under the State plan, a claimant shall not be deprived of benefits under the State plan for failure to give timely notice provided that:

1. The application to the private plan or for family leave insurance benefits during unemployment, *N.J.S.A. 43:21-4*, would have been timely noticed to the State plan if it had been then made; and

2. Proof of family leave is made under the State plan not later than the time prescribed by the Act.

(e) If an employee is overpaid benefits under the State plan, the amount of such overpayment shall not be deducted from the amount of benefits to which he or she may be entitled under a private plan or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant for a subsequent period of family leave. If an employee is overpaid benefits under a private plan, the amount of such overpayment shall not be deducted from the amount of benefits to which he or she may be entitled

under the State plan, or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant for a subsequent period of family leave.

(f) Where a care recipient has utilized a health care provider, and that health care provider has examined the care recipient and has diagnosed him or her with a serious health condition, the claimant may only be denied benefits during that period so certified where:

[page=1079] 1. The Division has contacted the care recipient's personal health care provider and has reached a mutual agreement therewith as to a change in the period of the care recipient's serious health condition or care required by the care giver;

2. A licensed medical practitioner designated by the Commissioner of Labor and Workforce Development or his or her designee has examined the care recipient and has determined that the care recipient no longer has a serious health condition or requires care by the care giver. Where such a determination has been made, benefits shall not be paid beyond the date of examination;

3. A care recipient refuses to submit to or fails to attend an examination conducted by a licensed medical practitioner designated by the Commissioner of Labor and Workforce Development or his or her designee, in which case the claimant shall be disqualified from receiving all benefits for the period of family leave in question, except as to benefits already paid; or

4. The Division has obtained credible factual evidence showing that the care recipient is performing activities that demonstrate a serious health condition does not exist. In such instances, benefits shall not be paid beyond the date that such factual evidence is obtained.

(g) If a physical examination of a care recipient is required, the Commissioner of Labor and Workforce Development or his or her designee shall authorize such examination to be made by a licensed medical practitioner. Upon submission of a written report of the examination to the Department of Labor and Workforce Development, a fee customarily charged by a physician in a given specialty for each such examination, shall be paid to the examining medical practitioner, which fee shall be charged to the Family Temporary Disability Leave Account as a cost for the administration of family leave insurance benefits payments. Upon recommendation of the Director and upon a finding that an increase or decrease in the customary or "fair market" fee is necessary or appropriate to be cost effective and supply a sufficient pool of examiners, the Commissioner may increase or decrease the customary fee pursuant to a schedule issued by the Commissioner on a Statewide or county basis for one or more of these groups of examiners. In cases requiring the services of a specialist, or in cases requiring clinical tests supporting the diagnosis, the Commissioner or his or her designee shall, in his or her discretion, authorize such services or tests, the fees to be fixed in advance by the Commissioner.

(h) The responsibility for coverage shall be established by the covered individual's last employer. The application for benefits shall be processed by the insurer, if the employer has an approved private plan and the individual is covered by that plan, or by the State plan if the employer has State plan coverage. However, claims coming within the purview of *N.J.A.C. 12:21-2.10* or *3.6* shall be governed thereby.

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.

(b) Proof of the care recipient's serious health condition or of the birth of a child or of the placement for adoption of a child on which a claim for family leave insurance benefits under the State plan is based shall be furnished by the claimant. The proof and claim accompanied, for claims relating to care of a family member (as opposed to bonding claims), by a certification of the health care provider, shall be furnished to the Division, on Form FL-1 (Proof and claim for fam-

ily leave insurance benefits) not later than 30 days after the commencement of the period of family leave for which family leave benefits are claimed.

(c) The health care provider certification contained within Form FL-1 shall state the following:

1. The date, if known, on which the serious health condition of the family member commenced;

2. The probable duration of the serious health condition of the family member;

3. The medical facts regarding the serious health condition of the family member, of which the health care provider has personal knowledge;

4. A statement that the serious health condition of the family member requires the participation of the covered individual in providing care to the family member;

5. An estimate of the amount of time, total time and frequency, that the services of the covered individual are required in order to participate in providing care to the family member;

6. The dates of treatment of the family member if the family leave is for planned medical treatment; and

7. Such other information as the Division may require.

(d) A continued claim form on which the claimant must provide additional medical information in order to continue receiving family leave insurance benefits shall be filed as proof of continued family leave when requested by the Division.

(e) The failure to furnish a written notice or proof of family leave within the time or manner required by the Act and this subchapter shall not invalidate or reduce any claim, if it shall be shown to the satisfaction of the Division not to have been reasonably possible to furnish notice or proof and that such notice or proof was furnished as soon as reasonably possible. If such notice or proof is not furnished, the claim shall be reduced and limited to the period commencing 30 days prior to the receipt of the notice or proof of family leave.

(f) The Division shall require each claimant to have a valid Social Security Number when filing a claim for benefits. The claimant, upon request of the Division, shall provide proper identification, including proof of a valid Social Security Number, verification of the Social Security Number if there is a discrepancy, and documentation showing his or her legal name and address.

1. If unable to present proof of a valid Social Security Number, proper verification, or other appropriate documentation, the individual shall be determined ineligible for benefits until such time that he or she is able to present the required identification.

2. Any person who refuses or fails to cooperate with the Division in any effort to verify the validity of a Social Security Number, may be held ineligible for benefits from the date of claim and liable to refund any benefits previously paid.

3. Upon a showing of good cause by the claimant, the Division may, on a claimant-by-claimant basis, waive the requirement that the claimant have a valid Social Security Number when filing a claim for benefits.

12:21-3.3 Filing of claims for benefits

(a) All claims and other required documents relating thereto may be filed by mail or by such other means as prescribed by the Division (including by electronic means), except in those cases where the claimant is notified by the Division that a personal appearance will be required. Filing by mail or by such other means as prescribed by the Division (including by electronic means) shall be deemed complete based on the postmark date, or in its absence, the date received by the Division.

(b) Family leave insurance benefits shall be payable to any claimant while outside of this State, provided he or she complies with the Act and this subchapter.

12:21-3.4 Reestablished claims

(a) For a reestablished claim either where the care recipient is not the same as for the most recent previous claim or where the reestablished claim is filed during or following employment with a different employer than for the most recent previous claim, the claimant shall be required to serve a waiting period.

(b) For the claimant who satisfies the requirements of (a) above, the weekly benefit rate for the reestablished claim shall be recalculated pursuant to *N.J.S.A. 43:21-40*.

(c) For the claimant who satisfies the requirements of (a) above, the maximum total family leave insurance benefits payable in days for the existing 12-month period under *N.J.S.A. 43:21-38*, shall be reduced by the number of days in family leave insurance benefits, which have been paid to the claimant during that 12-month period.

[page=1080] (d) For a reestablished claim where both the care recipient is not the same as for the most recent previous claim and the reestablished claim is filed during or following employment with a different employer than for the most recent previous claim, the claimant shall be required to serve a waiting period.

(e) For the claimant who satisfies the requirements of (d) above, the weekly benefit rate for the reestablished claim shall be re-calculated pursuant to *N.J.S.A. 43:21-40*.

(f) For the claimant who satisfies the requirements of (d) above, the maximum total family leave insurance benefits payable in days for the existing 12-month period under *N.J.S.A. 43:21-38*, shall be reduced by the number of days in family leave insurance benefits which have been paid to the claimant during that 12-month period.

12:21-3.5 Reduction of benefits

(a) The amount of benefits otherwise payable to a claimant under the State plan for any week of family leave, or part thereof, shall be reduced by the amount paid concurrently under any governmental or private retirement, pension or permanent disability benefit or allowance program to which his or her most recent employing unit contributed on his or her behalf. If such latter benefits are being paid on a monthly basis, the amount thereof to be deducted for each day of family leave shall be determined as 1/30 of such monthly amount, multiplied by seven, and the amount (disregarding any fractional part of a dollar) shall be subtracted from the weekly benefit rate. If such latter benefits are being paid on a weekly basis, the amount thereof to be deducted for each day of family leave shall be determined as 1/7 of the weekly amount multiplied by the number of days of family leave during that week and that amount (disregarding any fractional part of a dollar) shall be subtracted from the weekly benefit rate.

(b) The amount of benefits payable to a claimant under the State plan for any week of family leave, or part thereof, shall not be reduced by the amount of benefits payable under any program as mentioned above, unless one or more payments thereunder have been received by the claimant prior to the date on which the check in payment of benefits under the State plan is issued.

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

(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.

(g) Where the employer does not request a reduction of maximum family leave insurance benefits entitlement under (e) above, the State plan or private plan, as the case may be, shall not 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.

(h) When the employer permits the claimant to use paid sick leave, paid vacation time or other leave at full pay under (d) above, the claimant's maximum family leave insurance benefits entitlement during the 12-month period shall not be reduced by the number of days of leave at full pay permitted by the employer to be used by the claimant under (d) above and which has been paid by the employer to the claimant during the period of family leave.

(i) When the employer permits the claimant to use paid sick leave, paid vacation time or other leave at full pay under (d) above, no family leave insurance benefits shall be payable during the period that the claimant is absent from work using paid sick leave, paid vacation time or other leave at full pay.

(j) An employee's maximum family leave insurance benefit entitlement under the State plan for a given 12-month period shall be reduced by the number of days of family leave insurance benefits that have been paid to the employee during that 12-month period under a private plan or under *N.J.S.A. 43:21-3* and 4 as an unemployed claimant.

12:21-3.6 Concurrent coverage and multiple employers

(a) A covered individual is in "concurrent employment" if he or she is in employment with two or more employers during the last calendar day of employment immediately preceding the period of family leave. The term "concurrent employers" means the covered employers with whom an employee was employed on the last day of employment.

(b) If an employee is in concurrent employment and only one employer has a private plan, then the employee shall be entitled to receive benefits under that private plan, if otherwise eligible. Such benefits shall not be less than he or she would be eligible to receive under the State plan with respect to all employment, if he or she were covered under the State plan. No benefits shall be payable under the State plan for family leave commencing while he or she is covered under such private plan.

(c) If an employee is in concurrent employment and all employers are covered under the State plan, an individual shall have his or her weekly benefit amount under the State plan computed on the basis of his or her total wages with all such employers during the base weeks in the eight calendar weeks immediately preceding the calendar week in which the family leave commenced.

12:21-3.7 Notice from claimant to the employer

(a) With regard to a claim for family leave insurance benefits to bond with a newborn or newly adopted child, the covered individual shall provide the employer with notice of the period of family leave upon which the covered individual's claim for family leave benefits is based not less than 30 days prior to commencement of the family leave, unless the family leave commences while the individual is receiving unemployment benefits, in which case the covered individual shall notify the Division.

(b) Failure by the claimant to provide the employer with the 30 days notice set forth in (a) above, shall result in a reduction in the claimant's maximum family leave insurance benefits entitlement for the 12-month period by an amount of

benefits attributable to two weeks of family leave, unless the time of the leave is unforeseeable or the time of the leave changes for unforeseeable reasons.

(c) With regard to a claim for family leave insurance benefits to care for a family member with a serious health condition, which family leave insurance benefits are taken on a continuous, non-intermittent basis, the claimant shall provide the employer with prior notice of the family leave in a reasonable and practicable manner, unless an emergency or other unforeseen circumstance precludes prior notice.

(d) Failure by the claimant to provide the employer with the notice set forth in (c) above, shall not result in a reduction in the claimant's maximum family leave insurance benefits entitlement, nor shall it result in the denial of a claim for family leave insurance benefits.

(e) With regard to a claim for family leave insurance benefits to care for a family member who has a serious health condition, which family leave insurance benefits are taken on an intermittent basis, the claimant shall provide the employer with prior notice of the family leave not less than 15 days prior to the first day on which family leave insurance benefits are paid for the intermittent leave, unless an emergency or other unforeseen circumstance precludes prior notice.

[page=1081] (f) Failure by the claimant to provide the employer with the notice set forth in (e) above, shall not result in a reduction in the claimant's maximum family leave insurance benefits entitlement, nor shall it result in the denial of a claim for family leave insurance benefits.

12:21-3.8 Notice from the Division to the claimant and employer

(a) A claimant shall be given written notice of any decision on his or her claim and of the reason for any denial of his or her claim.

(b) If the "Employer's Statement" on the application for benefits has not been completed by an employer or his or her representative, a request for information shall be mailed or delivered to the employer or employers by whom the claimant was employed at the commencement of the family leave or by whom he or she was last employed if out of employment less than two weeks.

(c) A copy of the decision of eligibility of the claimant stating his or her weekly benefit rate and the probable duration for which benefits will be paid, shall be mailed or delivered to the employer or employers by whom such claimant was employed at the commencement of the family leave or by whom he or she was last employed if out of employment less than two weeks.

12:21-3.9 Notice required from employers

(a) Within 10 days after the mailing of a request for information with respect to a period of family leave, an employer shall furnish the Division with any information requested or known to him or her, which may bear upon the eligibility of the claimant.

(b) If any employer or employing unit fails to respond to the request for information within 10 days after the mailing of such request, the Division shall rely entirely on information from other sources, including an affidavit completed by the claimant to the best of his or her knowledge and belief with respect to his or her wages and time worked. If it is determined that any information in such affidavit is erroneous, no penalty shall be imposed on the claimant except in the event of fraud.

(c) Any employer failing to respond to a request for information within the prescribed time period shall be subject to the penalties provided under *N.J.S.A. 43:21-55(b).*

(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.

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.

(b) A covered individual shall be eligible for family leave insurance benefits where the covered individual seeks to take intermittent family leave for the purpose of providing care for a family member who has a serious health condition, so long as the following conditions are met:

1. The covered individual can establish that it is medically necessary to take the family leave intermittently;

2. The total period within which the intermittent family leave is to be taken does not exceed 12 months;

3. The covered individual makes a reasonable effort to schedule the leave, so as not to unduly disrupt the operations of the employer; and

4. Where possible, prior to the commencement of the intermittent family leave, the covered individual provides the employer with a regular schedule of the day or days of the week on which the intermittent family leave will be taken.

(c) In order to establish eligibility for family leave insurance benefits for a period of intermittent family leave to care for a family member with a serious health condition, a covered individual shall be required to support the claim for family leave benefits with a certification from a health care provider, which states the following:

1. The date, if known, on which the serious health condition of the family member commenced;

2. The probable duration of the serious health condition of the family member;

3. The medical facts regarding the serious health condition of the family member, of which the health care provider has personal knowledge;

4. A statement that the serious health condition of the family member requires the participation of the covered individual in providing care to the family member;

5. An estimate of the amount of time, total time and frequency (for example, for a total of three months, two days per week) that the services of the covered individual are required in order to participate in providing care to the family member;

6. A statement as to the medical necessity for the intermittent leave and the expected duration of the intermittent leave; and

7. The dates of treatment of the family member if the family leave is for planned medical treatment.

12:21-3.11 School employees

(a) Between academic years or terms or during a school-wide recess, for an individual who is an employee of an educational institution and who has a reasonable assurance of returning to work in the same or similar capacity during the succeeding academic year or term or following a period of school-wide recess, such individual shall be considered a covered individual and in-employment between academic years or terms or during a school-wide recess.

(b) Under the circumstances set forth in (a) above, the individual ***who does not work for the educational institution between academic years or terms or during a school-wide recess*** shall not be eligible for family leave insurance benefits between academic years or terms or during a school-wide recess.

(c) Under the circumstances set forth in (a) above, where the individual who is an employee of an educational institution has sufficient base year wages in other covered employment and where these wages are sufficient to establish a valid claim, family leave insurance benefits shall be paid based only upon the wages from such other covered employment for the period of time between the academic years or terms or during the school-wide recess.

(d) When an employee files a claim for family leave insurance benefits immediately following a period between academic years or terms or immediately following a school-wide recess covered under (a) above, because the employee is considered a covered individual and in employment during the period between academic years or terms or the school-wide recess immediately preceding the claim for family leave benefits, the claimant's lack of remuneration during the 14 days preceding the filing of the family leave insurance benefits claim shall not preclude coverage of the employee's claim for family leave insurance benefits under the State plan or a private plan.

(e) Under the circumstances set forth in (c) and (d) above, as in all circumstances, the "average weekly wage," which is a key component of the family leave insurance benefits calculation, shall be determined in accordance with *N.J.S.A. 43:21-27(j).*

12:21-3.12 Leaves of absence and continuity of employment

(a) An employee who is on a voluntary and mutually agreed upon leave of absence, whether that leave of absence is paid or unpaid, including a leave of absence covered under the Federal Medical and Family Leave Act or the New Jersey Family Leave Act, shall be considered a covered individual and in-employment during such a leave of absence.

(b) When an employee files a claim for family leave insurance benefits immediately following a period of voluntary and mutually agreed upon leave of absence covered under (a) above, because the employee is considered a covered individual and in employment during the period of voluntary and mutually agreed upon leave of absence immediately preceding the claim for family leave benefits, the claimant's lack of remuneration during the 14 days preceding the filing of the family leave insurance benefits claim shall not preclude coverage of the employee's [page=1082] claim for family leave insurance benefits under the State plan or a private plan.

(c) Under the circumstances set forth in (b) above, as in all circumstances, the "average weekly wage," which is a key component of the family leave insurance benefits calculation, shall be determined in accordance with *N.J.S.A. 43:21-27(j).*

12:21-3.13 Filing of appeals

Unless the claimant ***or the employer***, within seven calendar days after the delivery of a determination or notification thereof, or within 10 calendar days after such notification was mailed to his or her last-known address, files an appeal from such determination, it shall be final and benefits shall be paid or denied in accordance therewith.

12:21-3.14 Rules on appeal

The rules of the Board of Review shall govern appeals in family leave insurance benefit cases under the State plan. See the appeal rules at *N.J.A.C. 12:20.*

12:21-3.15 Family leave insurance benefit calculation during period from July 1, 2009 through December 31, 2009

For the purpose of calculating the amount of family leave insurance benefits to which a covered individual is entitled with regard to a claim filed between July 1, 2009 and December 31, 2009, all wages earned during the 52 weeks immediately preceding the filing of the claim shall be used, including wages earned between July 1, 2008 and December 31,

2008, notwithstanding that no employee contributions to the Fund were collected under P.L. 2008, c. 17, prior to January 1, 2009.