

ARE SOME EMPLOYEES ENTITLED TO MORE THAN 12 WEEKS OF PREGNANCY LEAVE UNDER STATE AND FEDERAL LAW?

by Jonathan I. Nirenberg

Since the passage of the Family and Medical Leave Act (FMLA)¹ in 1993, employees in New Jersey have been entitled to family leaves under two statutes, the FMLA and the New Jersey Family Leave Act (FLA).² Nonetheless, there is a dearth of case law discussing the interaction between these two laws.

Employees in New Jersey who meet the eligibility requirements of both the FMLA and the FLA are entitled to take leaves pursuant to both statutes.³ Because employers can have the leaves run concurrently⁴ this often does not give employees any additional rights. But, an eligible employee who takes a leave pursuant to one statute that is *not* available under the other may still be entitled to take a leave under the other statute.⁵ For example, an employee who takes 12 weeks of leave for his or her own serious health condition under the FMLA is still entitled to take up to 12 weeks of family leave under the FLA if he or she has not taken any family leave during the applicable 24-month period, because only the FMLA, and not the FLA, provides for medical leave for oneself.⁶

As the Code of Federal Regulations (CFR) state:

Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA... Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and

...[U]nder certain circumstances employees may be entitled to take as much as 12 weeks of maternity leave under the FMLA and still be entitled to an additional 12-week leave under the FLA in the same 12-month period.

an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws.⁷

The CFR also give several examples of the application of this rule. One particularly pertinent example is as follows:

If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided

for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."⁸

Although no reported case in New Jersey state or federal court has yet to decide this issue, a careful reading of the FMLA, the FLA and the applicable regulations suggests that because the statutes provide somewhat different rights with respect to maternity/paternity leave, under certain circumstances employees may be entitled to take as much as 12 weeks of maternity leave under the FMLA and still be entitled to an additional 12-week leave under the FLA in the same 12-month period. For example, if an employee takes an FMLA leave for pregnancy-related complications (before giving birth), that time should not count toward her FLA

entitlement because the FLA does not provide for maternity leave until the child is born.

The FMLA entitles employees to "12 workweeks of leave during any 12-month period for...the birth of a son or daughter of the employee and in order to care for such son or daughter."⁹ In contrast, the FLA entitles employees in New Jersey to a family leave of "12 weeks in any 24-month period...within a year *after* the birth."¹⁰ Both the FMLA and the FLA require an employer to reinstate an employee to his or her former position, or an equivalent one, upon the expiration of his or her leave.¹¹

Unlike the FMLA, the FLA provides only for *family* leave, not *family and medical* leave. Therefore, it should not be surprising that the express legislative purpose of the FLA, with respect to maternity leave, is to entitle employees to take a period of leave "upon the birth or placement for adoption of a child... without risk of termination of employment or retaliation by employers and without loss of certain benefits."¹²

In contrast, the FMLA entitles eligible employees to 12 weeks of leave "[b]ecause of the birth of a son or daughter of the employee *and* in order to care for such son or daughter."¹³ Thus, under the FMLA an employee is entitled to take a leave for "[a]ny period of incapacity due to pregnancy, or for prenatal care."¹⁴ In other words, the FLA only provides for maternity/paternity leave after the child is born, while the FMLA provides the parent a total of 12 weeks to care for herself and her child.¹⁵

The New Jersey Administrative Code provides a particularly instructive example of the interaction of the FLA and the FMLA in the context of pregnancy leave. The example states that:

A State employee is disabled due to her pregnancy and is unable to work. The employee needs to take 12 weeks of leave for this reason. If the employee is eligible for medical leave

under the FMLA, then the 12 weeks of pregnancy-disability leave will count toward her FMLA entitlement for that 12-month period. If she thereafter wishes to take 12 weeks of leave to care for her new child and is eligible under the State law, she may then take 12 weeks of family leave.¹⁶

In that example, the employee is entitled to a total of 24 weeks of leave relating to the birth of a child because the 12 weeks of pregnancy-disability leave, before the birth of her child, would only be covered by the FMLA. Thus, even if she took 12 weeks of FMLA leave prior to the birth of her child, she would still be entitled to take 12 weeks of FLA leave within a year after the birth of her child, for a total of 24 weeks of leave.

Thus, it seems clear that an eligible employee who takes a FMLA leave for pregnancy-related complications, who has not otherwise used her FLA leave in the relevant two-year period, is entitled to an additional 12 weeks of maternity leave upon the birth of her child. Nonetheless, many employers are unaware of this obligation, and many employees are unaware of this right. As a result, many companies that intend to comply with both laws have promulgated policies that do not properly take into account the interaction between the FMLA and the FLA — and many employees are not taking advantage of their full rights under both laws because of their lack of knowledge and/or in reliance on these unlawful maternity leave policies. It is therefore incumbent upon New Jersey employers and counsel practicing in the field of employment law to become familiar with both the FMLA and the FLA, and to understand the complexities of the interactions between them. ■

Endnotes

1. 29 U.S.C. §§ 2601, *et seq.*
2. N.J.S.A §§ 34:11B-1, *et seq.*
3. To be eligible for an FMLA leave,

an employee must have worked for the previous 12 months and worked at least 1,250 hours during those 12 months at an employer that employs at least 50 employees within 75 miles of the location at which the employee works. 29 U.S.C. §§ 2611(1), 2611(4)(A). To be eligible for an FLA leave, the employee must have worked for the previous 12 months and at least 1,000 hours during those 12 months at the company from which he or she is seeking the leave, and the company must employ more than 50 employees. Sections 6-2 and 6-3.

4. 29 C.F.R. § 825.701(a) ("[i]f leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws").
5. 29 C.F.R. § 825.701(a).
6. The FMLA provides for medical leaves for oneself. 29 U.S.C. § 2612(D). The FLA only provides leave for family members. N.J.S.A. §§ 34:11B-3(i), 34:11B-4.
7. 29 C.F.R. § 825.701 (emphasis added).
8. 29 C.F.R. § 825.701(a)(5).
9. 29 U.S.C. § 2612(A).
10. N.J.S.A. § 34:11B-4(c) (emphasis added).
11. 29 U.S.C. § 2614(a)(1); N.J.S.A. § 34:11B-8.
12. N.J.S.A. § 34:11B-2 (emphasis added).
13. 29 U.S.C. § 2612(1)(A) (emphasis added).
14. 29 C.F.R. §§ 825.114(a)(2)(ii); 825.800; *see also*, *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474 (D. Kan. 1996); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1121 (W.D. NY. 1996).
15. *See*, N.J.S.A. § 34:11B-2; *D'Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 6-8 (App. Div. 1992).
16. N.J.A.C. § 4A:6-1.21, example three (emphasis added).

Jonathan I. Nirenberg practices with Deutsch Resnick & Green.