



NEW JERSEY FAMILY LEAVE INSURANCE ACT (FLIA)

WHAT IS THE FLIA?

- A new law that provides up to six (6) weeks of state payments in lieu of salary (similar to unemployment benefits) to employees who need to take time off to care for a new child or a sick family member.
- The new law does not create a right to take family disability or child-rearing leave. It only provides for state payments to individuals on such leaves. Employees who have a right to family leave under existing law, contract or an employer policy have the right to obtain the state payments and the right to reclaim their job after the leave, if the law, contract or policy so provides.
- NOTE- Employers may terminate the employment of employees who receive the state payments who have not been granted a leave by the employer and who do not have any other right to return to work under existing law, contract, or policy. **In such cases, the employee can collect the state payment but still lose his or her job.**

WHAT EMPLOYERS ARE COVERED BY FLIA?

- All government employers are covered under FLIA. Private employers who are included in the State Temporary Disability Benefits Law are also covered.
- No minimum number of employees per worksite is required for participation in FLIA. School employees who work for employers with less than 50 employees are covered under the NJ Family Leave Act (NJFLA) for purposes of obtaining a leave. School employees are not covered under the Federal Family and Medical Leave Act (FMLA) to the extent their employer has less than 50 employees.

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DOES FLIA COVER ALL EMPLOYEES?

- It covers only employees who are otherwise eligible under New Jersey's unemployment compensation law which requires either that:
 - an employee must have worked at least 20 base weeks for a covered employer and have earned no less than 20 times the minimum wage per week (currently \$143/week)
 - OR
 - earned at least 1,000 times the minimum wage (currently \$7,150) in the one (1) year prior to the leave.
- These requirements differ from FMLA (1,250 hours worked in last 12 months) and NJFLA (1,000 hours within last 12 months) requirements.
- Out-of-state or federal employment does not count to qualify an individual.

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WHAT BENEFITS DOES THE NEW LAW PROVIDE?

- Beginning July 1, 2009, employees are eligible for up to six (6) weeks of benefit payments during any consecutive 12-month period.
- The payments do not begin until after the employee has been on the leave for seven (7) consecutive calendar days (the "waiting period"). Under the proposed regulations, if the leave lasts more than four (4) weeks (28 calendar days), payment will be made retroactively for the first week. The statute actually says that the first week should be paid if the leave lasts over 21 days. *
- If the leave is intermittent, compensation begins with the next day of leave after seven (7) consecutive calendar days have passed since the first leave day was taken. The leave day(s) taken during the waiting period will be compensated retroactively if an intermittent leave day is taken after 21 days have passed since the first leave day was taken.

* NJEA will propose a change in the proposed regulations to correct this.

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HOW MUCH COMPENSATION MAY AN ELIGIBLE EMPLOYEE RECEIVE?

- The state payment will equal 2/3 of his/her "average weekly wage" up to a maximum of \$524/week (based on 2008 benefit levels).
- This compensation is not salary from the employer and so will not be subject to pension, annuity, or similar types of deductions related to benefits that would be applicable during a salary-paid leave given by the employer. The payments are excluded from state income tax.
- No pension credit will accrue and seniority will stop accruing after regular salary has stopped for 30 days. No right to employer paid health insurance will apply unless the FLIA payments are made during a simultaneous usage of FMLA and/or NJFLA leave or the employer is required by contract to maintain the health insurance.

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HOW DOES AN EMPLOYER DETERMINE “AVERAGE WEEKLY WAGE?”

- Divide the total wages earned with the most recent covered employer in the eight weeks prior to the leave by eight (weekly earnings must be at least 20 times the minimum wage). If the individual had more than one employer during the eight weeks prior to the leave and the average weekly wage would be higher by including wages earned from the other covered employers, those wages should be included in the calculation.
- An alternate calculation based on the average of the last 26 weeks of employment may be used if it results in a higher benefit. **This may result in a reduced benefit for some 10-month school employees who start a family leave at the beginning of an academic year.**
- If the individual has just returned from his/her own disability leave, the calculation is done based on the eight weeks prior to the start of the individual's disability leave, not the beginning of the period of family disability leave.

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UNDER WHAT CIRCUMSTANCES MAY AN EMPLOYEE REQUEST FAMILY LEAVE INSURANCE PAYMENTS?

- **To care for a family member with a serious health condition who is unable to care for himself or herself.** A “family member” is defined as a child, spouse, parent, domestic partner, or civil union partner.
 - Further, to be considered a child, he/she must be less than 19 years of age or be 19 years of age **or older but incapable of self-care** because of mental or physical impairment.
 - **Employers or the State may argue that this latter exception is limited to a child who was impaired since before the age of 19. Employee advocates will oppose that restrictive approach.**
- **To care for a newborn or newly adopted child.** A “child” means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of a covered individual, or child of a civil union partner of the covered individual.
- The leave must be **completed** within 12 months after the birth or adoption.

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DEFINITIONS:

- A **“parent of a covered individual”** means a biological parent, foster parent, advocate parent, or stepparent of the eligible employee or a person who was a legal guardian of the eligible employee when the eligible employee was a child. It does not include ‘parents-in-law,’ although NJFLA does include them. So no payment would be due for care of an ‘in-law.’
- A **“serious health condition”** is defined as it is under NJFLA, i.e., an illness, injury, impairment, or physical or mental condition which requires:
 - Inpatient care in a hospital, hospice, or residential medical care facility;
 - Or continuing medical treatment;
 - Or continuing supervision by a health care provider.

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- **“Care”** is defined by NJFLA, to mean, 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.

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- **“Continuing Medical Treatment or Supervision”** is defined to include:
 - 1) Incapacity (unable to work, attend school, or perform regular activities due to health condition, treatment, or recovery there from) for over three consecutive days plus any subsequent treatment;
 - AND
 - Treatment two or more times by a health care provider; or
 - Treatment by such a provider once, with continuing treatments thereafter under the provider’s supervision;
 - OR
 - 2) Incapacity due to pregnancy or prenatal care; or
 - 3) Treatment or incapacity due to a chronic serious health condition; or
 - 4) Incapacity due to a long-term condition that is not likely to improve which requires supervision, but not treatment, by a health care provider; or
 - 5) Multiple treatments of a condition that would otherwise result in incapacity for more than three days, in the absence of treatment.

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MAY AN EMPLOYEE RECEIVE FAMILY LEAVE INSURANCE PAYMENTS DURING INTERMITTENT LEAVE TO CARE FOR A FAMILY MEMBER?

- Yes, employees may receive FLIA payments during intermittent leave to care for a sick family member. An employee is entitled to 42 days of intermittent leave within 12 consecutive months.
- The need for intermittent leave must be supported by a medical certification.
- Leave should be scheduled so as not to unduly disrupt the operations of the employer.

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MAY AN EMPLOYEE RECEIVE FAMILY LEAVE INSURANCE PAYMENTS DURING INTERMITTENT LEAVE TO CARE FOR A NEWBORN OR ADOPTED CHILD?

- No, normally leave for the care of a newborn or newly adopted child must be continuous, unless the employer and employee agree otherwise. **THIS IS PROBABLY A NEGOTIABLE ITEM.**
- If the employer consents to intermittent child rearing leave, it must disclose the agreement to the State.

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WHAT DOCUMENTATION IS REQUIRED TO DEMONSTRATE THE SERIOUS HEALTH CONDITION OF A FAMILY MEMBER?

- A notice including the employee's name, address, social security number, and date of leave start must be sent to the state within 30 days after the leave begins, together with:
- A medical certification which states:
 - the date the family member's condition began (if known),
 - the expected duration,
 - medical facts regarding the condition,
 - a statement that the condition warrants the participation of the employee,
 - and an estimate of the amount of time care will be needed.
- For intermittent leave, the medical certification must also state:
 - that intermittent leave is medically necessary,
 - its expected duration,
 - and the dates of any planned medical treatment.
- State forms are being developed to be used, if desired, but they will not be mandatory. **Medical providers may not charge for filling out the medical certification.**

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MAY THE STATE REQUIRE ADDITIONAL MEDICAL EVALUATIONS?

- The State may require that the family member with a serious health condition be examined by a state-designated health care provider at state expense. A private plan administrator may do so as well, but not more than once* a week at the plan's expense at a reasonable time and place.
- A family member's refusal to submit to an examination shall disqualify a claimant from benefits, except benefits already paid.

* NJEA has proposed a change in the proposed regulations to limit this to once every two (2) weeks.

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WHAT IF AN EMPLOYEE RECEIVING FAMILY LEAVE INSURANCE PAYMENTS BECOMES DISABLED?

- An individual may not simultaneously receive benefits for paid family leave in conjunction with any other disability benefits (or unemployment compensation).
- Thus, an employee who becomes disabled and eligible for disability benefits while on paid family leave would no longer be eligible for paid family leave benefits. However, if the employee becomes disabled, but has no right to disability payments for themselves, they could continue to receive the FLIA payments.

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WHAT ARE THE EMPLOYER'S NOTIFICATION OBLIGATIONS?

- Post a notice of benefits for employees to see in a conspicuous place within 30 days once it is issued by the Commissioner of Labor.
- Provide the notice to all new employees, to employees who request leave and may be eligible for benefits under this law, and to any employee who requests a copy.
- Transmit to the State and to the employee (within nine days of the start of the leave) forms containing name, address, Social Security number, and wage information of the individual.
- Upon receipt of notice of state approval of an employee's claim for FLIA payments, inform the State within two days if any information impacting eligibility or leave duration exists.
- Respond within 10 days to a request for information by the state.

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WHEN REQUESTING FAMILY LEAVE INSURANCE PAYMENTS TO CARE FOR A FAMILY MEMBER?

- Must provide prior notice to their employer in a "reasonable and practicable manner" unless an emergency or unforeseen circumstances preclude doing so.
- Must provide 15 days notice to their employer for intermittent leave to care for a family member with a serious health condition unless an emergency or unforeseen circumstances preclude doing so. Employees should try not to unduly disrupt business operations when requesting intermittent leave.
- Must notify the State of the claim within 30 days after the leave's start, with medical certification.

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WHAT NOTICE MUST EMPLOYEES GIVE
WHEN REQUESTING FAMILY LEAVE
INSURANCE PAYMENTS TO CARE FOR
A NEWBORN OR NEWLY ADOPTED
CHILD?

- The employee must provide 30 days notice to their employer prior to the birth or adoption.
- Failure to provide such notice will reduce benefits to the employee by two weeks, unless the time of the leave is unforeseeable, or changes for unforeseeable reasons.
- The employee must provide notice to the State of the claim for FLIA payments and proof of the date of birth or adoption within 30 days after the start of the leave.

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WHAT IS THE IMPACT OF THE NEW
LAW ON DOMESTIC PARTNERS AND
CIVIL UNIONS?

- Domestic partners and civil union partners are entitled to FLIA payments for leaves to care for each other or for the other's newborn or newly adopted child:
 - The definition of "family member" includes domestic partner or civil union partner.
 - The definition of "child" includes the child of a domestic partner or civil union partner of the employee.

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WHAT RIGHTS DO EMPLOYEES HAVE TO RETURN TO WORK AFTER TAKING A FAMILY LEAVE ?

- FLIA, by itself, does not provide employees any job protection upon return from leave. Such job protection would exist if FMLA or NJFLA apply or if a collective agreement does so, or if it exists under other laws. **THIS IS PROBABLY A VALID SUBJECT FOR NEGOTIATION.**
- This means that unless an employee has the right to take a family leave under FMLA, NJFLA, collective agreement, or employer policy, the employer could deny the leave. If the employee takes the leave anyway, he/she could qualify for the FLIA payment, but could be terminated (if he/she is not tenured, or not tenure eligible) or, if he/she is tenured, be brought up on tenure charges for insubordination and/or job abandonment.
- FLIA expressly states that an employee will not have a claim against an employer for termination due to the taking of a family leave, including a claim for breach of an implied provision of the employment agreement, wrongful discharge in violation of public policy, or any other common law or tort claim.

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CAN AN EMPLOYER DENY AN EMPLOYEE FLIA BENEFITS?

- NO. While the employer approves the leave itself, the State determines whether an employee is eligible for compensation while the employee is out on leave.
- An individual can apply for FLIA payments while an active employee or for up to 14 days after he/she has stopped being employed. However, resignation or termination for gross misconduct may bar the right to FLIA benefits. **An employee may not be working for pay, even part-time, while receiving FLIA payments.**
- Either an employer or an employee may appeal the State's determination of whether an employee is entitled to benefits. The appeal must be filed within seven days of receipt of the denial notice or within 10 days of when it was mailed to the employee. The appeal process is identical to the process used for appealing the denial of unemployment benefits.

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WHAT ARE THE CONSEQUENCES FOR MISREPRESENTATION OR FRAUD?

- The minimum penalties for misrepresentations, fraud, and other violations regarding the Family Leave Insurance Program are \$250 per statement or nondisclosure.
- The penalties for other willful violations are \$500 and additional penalties for violations with intent to defraud the program are not more than \$1,000 or imprisonment for up to ninety (90) days.
- Since an offense of dishonesty could be involved, school employees may face forfeiture of position, tenure charges, certification revocation charges and/or potential pension impact.

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HOW DOES FLIA IMPACT PRIVATE FAMILY DISABILITY INSURANCE PLANS?

- Private plans may provide for the payment of benefits in lieu of salary for employees on family leave. Such plans can be created, or continue if they currently exist, provided that the private plan does not:
 - charge employees more than the state plan will, or
 - provide lower benefits than the state plan will, or
 - restrict eligibility more than under the state plan.
- Such plans can be through an insurance carrier or be self-insured. State approval of any private plan is required. If such a plan is adopted, the covered employees will not pay into the state plan and cannot make claims under the state plan. **THIS IS PROBABLY A NEGOTIABLE SUBJECT.**
- Employees can petition the State to hold an election to terminate a private plan in favor of the state plan even if it has been approved by the State.

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HOW WILL THE FAMILY LEAVE INSURANCE PROGRAM BE FUNDED?

- Beginning January 1, 2009, employees must pay an additional tax of .09% of the portion of wages subject up to the statutory maximum used for state Temporary Disability Insurance (approximately \$28,900).
- The payroll deduction per employee will be about \$26 per year.
- The tax rate will increase to .12% in 2010.

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HOW DOES THIS NEW LAW INTERACT WITH FMLA AND NJFLA?

- Payments made under FLIA run concurrently with leave taken under FMLA and/or NJFLA whichever is applicable.
- This means that payments made under the new law will not provide employees with an additional six weeks of leave within a 12-month period, beyond the employee's FMLA and/or NJFLA leave.
- If an employee takes a family leave pursuant to a contract leave provision (such as a child-rearing leave) and has already used up his/her FMLA/FLA leave (for family leave reasons) during the last 12 months without filing for the FLIA payment, he/she may not be able to claim it, despite having the contractual right to a leave.

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HOW CAN AN EMPLOYER REPLACE DAYS OF FAMILY LEAVE INSURANCE PAYMENTS WITH SICK DAYS AND OTHER LEAVE?

- Under FLIA, an employer may require an employee to use up to two weeks of unused sick leave, personal leave, vacation, illness in the family or any other available paid leave days before collecting FLIA payments. **THIS REQUIREMENT IS PROBABLY NEGOTIABLE.**
- If these full-pay leave days are used, they are applied for the first two weeks of the leave, including the initially unpaid one week FLIA waiting period. If the employer sends a request to the State, this will result in a reduction in the available FLIA payments by the number of paid leave days used, up to a two week maximum. The use of a full two weeks of paid leave days would result in a reduction of available FLIA payments to four weeks if it is used immediately after the first two weeks of full-paid leave. **THE ISSUE OF THE EMPLOYER MAKING THIS REQUEST, OR NOT, IS PROBABLY NEGOTIABLE.**
- Employers can allow the use of accrued paid leave for more than two weeks of family leave, but the additional days do not reduce the available FLIA payments. FLIA payments cannot be received while an employee is on full-pay leave days. **THIS REQUIREMENT IS PROBABLY NEGOTIABLE.**

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WHAT ARE KEY DIFFERENCES BETWEEN FLIA AND FMLA/NJFLA?

- FLIA does not guarantee job security.
- Only FMLA allows the employee to take time off to care for him/herself.
- Only NJFLA includes “parent-in-law” in the definition of “family member” so FLIA payments would not be available to care for an “in-law.”
- FLIA provides state compensation while an employee is on leave, whereas FMLA and NJFLA provide for leave, without compensation.

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KEY DIFFERENCES, CONTINUED:

- Unlike FMLA and NJFLA, FLIA does not provide for continuation of health insurance benefits while receiving payments.
- FLIA and FMLA require that leave to care for a newborn or newly adopted child must be completed within 12 months of the birth or adoption.
- NJFLA allows leave to care for a newborn or newly adopted child to begin at any time within the 12-month period following the birth or adoption as long as it is completed within 24 months of birth.

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SUMMARY OF SOME AREAS FOR POTENTIAL NEGOTIATION

- Provisions to allow intermittent leave for child-rearing.
- Job security for individuals receiving FLIA compensation during a family leave not otherwise covered by FMLA or NJFLA.
- Creation of a replacement private family disability leave insurance plan with equal to or better benefits than FLIA provides.
- Make the use of other forms of paid leave for family leave purposes optional with the employee.

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SUMMARY OF SOME AREAS FOR POTENTIAL NEGOTIATION CONTINUED

- Provide that the employer will not request that an employee's available weeks of FLIA payments be reduced by the use of other available forms of paid leave.
- Establish a compensation plan to supplement FLIA payments so that the total amount received by the employee while on leave equals (but does not exceed) full salary.
- Negotiate over health insurance during FLIA leave to the extent it is not simultaneous with FMLA/NJFLA leave and a carrier will allow it.

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HYPOTHETICAL #1

SITUATION: Sally develops a complication during her pregnancy and requests three weeks off. She is able to come back to work before the birth of the baby and then requests time off for child rearing. Assuming Sally is eligible for FMLA and NJFLA leave and she had no accrued, unused vacation or sick time, how much leave is Sally entitled to? How much of the leave must be paid by the State?

ANSWER:

- Personal Disability – three weeks under the FMLA
- 12 weeks of child-rearing leave under the NJFLA of which six weeks will be paid for by the State under the FLIA.

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HYPOTHETICAL #2

SITUATION: Jim's stepmother was recently diagnosed with cancer and he has requested leave twice a week to take her to treatment sessions. Is Jim entitled to be paid for any portion of the family leave? How much leave is Jim entitled to? How much leave must be paid?

ANSWER:

- If Jim has not exhausted his NJFLA/FMLA family leave he is entitled to take up to 42 days of intermittent leave with FLIA payments from the state.
- All days must be taken within 12 months of the first day off.
- He may also have contractual "illness in the family" leave rights as well as rights to voluntarily use sick days or personal days, or be compelled to do so (for up to 14 calendar days) in the absence of negotiated provisions, past practice or policy.
- No FLIA payments would be made during those paid leave days.

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HYPOTHETICAL #3

SITUATION: Mary's daughter, Jane, is 35 years old and just gave birth during an emergency C-Section. The doctor requires Jane to stay on complete bed rest for four weeks. Even though Jane is no longer a "child," can Mary receive FLIA payments?

ANSWER:

The definition of child as used in FLIA may be the subject of litigation. The definition limits 'child' to those under 19, "except for those incapable of self-care because of mental or physical impairment". Since a family leave is always designed to allow help for someone "**with a serious health condition who is unable to care for himself or herself**" it seems that the exception would always be applicable. Since this makes the 19 year old limit a nullity, employer advocates will argue that the exception should be limited to children who were incapable of self-care continuously since they were younger than 19. The outcome is unknown.

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HYPOTHETICAL #4

SITUATION: Sue has four weeks of accrued, unused sick time. Her board employs over 200 people. She requests leave to care for her mother who has recently suffered a stroke. How much leave is Sue entitled to? How much of her leave must be paid? How much sick time can Sue's employer require her to use?

ANSWER:

She can take 12 weeks of FMLA/NJFLA leave, if it was not used previously. At least six weeks must be with some pay. In the absence of negotiation she can be forced to use two weeks of her sick time and can then collect four more weeks of FLIA payments from the State. She can also use four weeks of sick time, if her employer permits it, or is bound by contract to allow her to do so, and then take the four to six weeks of FLIA payments, for a total of eight to 10 weeks with some compensation. This depends upon whether her employer requests that her FLIA payments should be shortened by the first two weeks of paid leave.

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HYPOTHETICAL #5

SITUATION: Jake's domestic partner needs to have heart surgery and Jake has requested time off to care for him. Jake's Board employs 42 people. Is Jake entitled to time off? How much time off is Jake entitled to? If Jake's board fills his position when he is out on leave, does Jake have a cause of action against his employer to get his job back?

ANSWER:

- If Jake works for a public school and worked 1000 hours in the last year, he has a right to NJFLA leave (if not previously used) for 12 weeks. If so, he can collect six weeks of FLIA payments during that time and has the right to return to his job.
- If he has no NJFLA leave available he can request other leave from the Board and get FLIA payments for six weeks. If the leave is denied by the Board and he still takes the time off he will still receive payments under FLIA but will have no right to return to his job, unless he is tenured. He could be subjected to tenure charges if he is tenured.

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