

New Jersey Law Journal

VOL. CLXXIII - NO. 13 - INDEX I183

SEPTEMBER 29, 2003

ESTABLISHED 1878

Commentary

N.J. Family Leave Act Is in Need of Fixing

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The New Jersey Family Leave Act, N.J.S.A. 34:11B - 1, et. seq., should be amended to correct a number of obvious defects. These flaws, and their proposed remedies, are as follows:

Defect: The failure of New Jersey law to allow medical leave based on the illness, injury or other medical needs of the employee, and not merely the needs of a family member.

Remedy: Amend the law to provide equal benefits for employees whose illnesses or injuries require time off for medical treatment and cure as prescribed by physicians.

Defect: The requirement, by definition, that the employee be employed "for at least 12 months" "during the immediately preceding 12-month period" to qualify for leave. This provision excludes numerous worthy instances of such need by employees unprotected by the provisions of the New Jersey law and/or comparable federal Family and Medical Leave Act, 29 U.S.C. 2601, et. seq.

Remedy: Reduce the 12-month requirement to six months.

Defect: The requirement, also by definition, that an employer subject to the law be one employing 50 or more employees. This provision also leaves unprotected large numbers of worthy employees whose needs should and

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could be attended.

Remedy: Halve the 50-employee requirement.

Defect: The failure of the New Jersey Family Leave Act and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 and 10:5-4.1, to protect from discharge employees who are required to lose time from work due to medical conditions, illness or injury and are unprotected by family leave coverage under state or federal law.

Remedy: Amend both laws to prohibit the discharge of employees who are terminated while absent from work

The business community's predictions of dire consequences under the state and federal leave laws have not occurred.

due to disabling illness or injury, unless there is evidence of malingering or contrary medical orders by the treating physician.

We now have had 10 years of experience with the FMLA, and 14 under the New Jersey law, during which time the fears and predictions of business organizations as to the dire consequences of

such legislation have largely been shown to be unfounded.

To the contrary, and especially since FLA and FMLA leaves for family member illness will most often be taken without pay, employers have apparently been able to accommodate — and satisfy — their manpower requirements in spite of exigencies that occur in the lives of employees. This is especially evident during the current period of significant unemployment.

One obvious result of the "gap" in the New Jersey law is that attorneys who bring suit on behalf of employees whose rights under the federal FMLA may have been violated must cite the federal law and bring the action in federal court or be subject to removal of the case to federal court by defendants.

Regardless of whether removal to federal court provides any "advantage" to the defendant who removes an FMLA action, it is clear that the removal of such cases to federal courts burdens these courts with matters that probably could be handled more expeditiously in state court. This is especially true in counties that have routinely invoked the mediation system, which is not always available in the federal system.

It is also probably true that the preparation and trial of cases in the federal courts can be more expensive for both sides, for a variety of reasons, than in the state courts.

Moreover, it is quite illogical to maintain such a huge discrepancy in coverage between the New Jersey and federal laws, as exists today by New Jersey's exclusion from coverage of the

very employee whose absence for medical reasons places his or her job at risk.

The reasons for expanding the coverage of employment protection under New Jersey arises from the recognition that thousands of workers who require family or medical leave are unprotected by any law from termination stemming from the need to be out of work due to personal or family health reasons or

childbirth.

These may be people employed for less than one year, or employed by companies having fewer than 50 employees whose health and family needs, requiring some degree of protection, are no less than workers in the "protected" group. They may also be workers whose illnesses require that they be out of work for more than 12 weeks.

The job of a worker whose medical condition requires a four-month absence from work, but who is able to return to his former position, is completely unprotected under the New Jersey and federal family and medical leave acts, and is not specifically protected under the New Jersey LAD.

Clearly, there is a need for legislation to remedy these defects. ■