

# 55 N.J.R. 1836(a)

Copy Citation

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## RULE ADOPTIONS

### Reporter

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- NEW JERSEY REGISTER
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- RULE ADOPTIONS
- LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF TEMPORARY DISABILITY INSURANCE

## Agency

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LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF TEMPORARY DISABILITY INSURANCE

## Administrative Code Citation

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

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

## Text

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### Family Leave Insurance Benefits

Proposed: March 6, 2023, at 55 N.J.R. 339(a).

Adopted: July 28, 2023, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: July 28, 2023, as R.2023 d.098, **without change**.

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

Effective Dates: July 28, 2023, Readoption;

August 21, 2023, Amendments, Repeal, and New Rule.

Expiration Date: July 28, 2030.

### **Summary of Hearing Officer's Recommendations and Agency's Response:**

The period for submission of written comments regarding the rules proposed for readoption with amendments, a repeal, and a new rule ended on May 5, 2023. The Department of Labor and Workforce Development (Department) received a single written comment. The hearing officer reviewed the single written comment and recommended that the Department proceed with the readoption with amendments, a repeal, and a new rule without change.

### **Summary of Public Comment and Agency Response:**

A written comment was submitted by Stephanie L. Sikora, Esq., CPCU, Manager, Law and Regulation, NJM Insurance Group, Trenton, NJ.

COMMENT: The commenter asks the following:

- "We have a question related specifically to N.J.A.C. 12:21-3.9, wherein employers would be required to furnish the Department of Labor with information regarding a claimant's FLI Leave. Will the Department be providing a form through which employers will be able to provide this information or offering some other submission channel (for example, an online reporting system)?"

RESPONSE: The Family Leave Insurance Benefits statute, specifically, N.J.S.A. 43:21-39.1.f, as amended at P.L. 2018, c. 128, expressly states that the information listed at N.J.A.C. 12:21-3.9, which employers must furnish to its employees and to the Division of Temporary Disability Insurance no later than on the ninth day of the period of family temporary disability leave, or no later than on the ninth day after the employee notifies the employer of an anticipated period of family temporary disability leave, whichever comes first, shall be furnished through "printed notices on division forms." In accordance with the statute, the Department will provide a form to employers through which it may furnish "printed notices" to its employees and to the Division of Temporary Disability Insurance.

### **Federal Standards Statement**

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

**Full text** of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 12:21.

**Full text** of the adopted amendments and new rule follows:

#### **SUBCHAPTER 1. GENERAL PROVISIONS**

##### **12:21-1.2 Definitions**

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

"Act" means the Temporary Disability Benefits Law, N.J.S.A. 43:21-25 et seq., as amended by P.L. 2008, c. 17, which extends the temporary disability benefits program, so as to provide to covered individuals family leave benefits, a monetary benefit (not a leave entitlement), for one or more of the qualifying reasons as set forth at N.J.S.A. 43:21-27(o).

"Base year" with respect to a period of family leave means the first four of the last five completed calendar quarters immediately preceding the period of family leave, except that, if the individual does not have sufficient qualifying weeks or wages in the individual's base year to qualify for benefits, the individual shall have the option of designating that the individual's base year shall be the "alternate base year," which means the last four completed calendar quarters immediately preceding the period of family leave; and except that if the individual also does not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding the period of family leave, "alternate base year" means the last three completed calendar quarters immediately preceding the individual's benefit year and, of

the calendar quarter in which the period of disability commences, the portion of the quarter which occurs before the commencing of the period of family leave. "Disability" for the purpose of determining the base year with respect to a period of family leave for an individual who has a period of family leave immediately after the individual has a period of disability for [page=1837] 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 one or more of the qualifying reasons as set forth at N.J.S.A. 43:21-27(o).

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

...

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

"Child" means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, child of a domestic partner of the covered individual, or child of a civil union partner of the covered individual, including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier.

...

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

1. Participate in the providing of care for a family member of the individual made necessary by a serious health condition of the family member;
2. Be with a child during the first 12 months after the child's birth, if the individual, or the domestic partner or civil union partner of the individual, is a biological parent of the child, or is a parent of the child pursuant to a valid gestational carrier agreement, or the first 12 months after the placement of the child for adoption or as a foster child with the individual;
3. Engage in activities for which unpaid leave may be taken pursuant to N.J.S.A. 34:11C-3 of the New Jersey Security and Financial Empowerment Act, on the individual's own behalf, if the individual is a victim of an incident of domestic violence, a sexually violent offense, or to assist a family member of the individual who has been a victim of an incident of domestic violence, provided that any time taken by an individual who has been a victim of an incident of domestic violence, or a sexually violent offense for which the individual receives benefits for a disability caused by the violence or offense shall be regarded as a period of disability of the individual and not as a period of family leave; or
4. In the event of a state of emergency declared by the Governor, or when indicated to be needed by the Commissioner of the New Jersey Department of Health (Commissioner) or other public health authority, an epidemic of a communicable disease, a known or suspected exposure to the communicable disease, or efforts to prevent spread of the communicable disease, provided in-home care or treatment of the family member of the employee is required due to:
  - i. The issuance by a healthcare provider or the Commissioner or other public health authority of a determination that the presence in the community of the family member may jeopardize the health of others; and
  - ii. The recommendation, direction, or order of the provider or authority that the family member be isolated or quarantined as a result of suspected exposure to a communicable disease.

"Family leave" does not include any period of time during which a covered individual is paid temporary disability benefits pursuant to the New Jersey Temporary Benefits Law, N.J.S.A. 43:21-25 et seq., because the individual is unable to perform the duties of the individual's employment due to the individual's own disability.

"Family member" means a sibling, grandparent, grandchild, child, spouse, domestic partner, civil union partner, parent-in-law, or parent of a covered individual, or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee, which is the equivalent of a family relationship.

...

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

...

"Parent of a covered individual" means a biological parent, foster parent, adoptive parent, or stepparent of the covered individual or a person who was a legal guardian of the covered individual when the covered individual was a child, or who became the parent of a child pursuant to a valid written agreement between the parent and a gestational carrier.

...

#### 12:21-1.8 Notice to workers

(a)-(d) (No change)

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

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

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

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

#### SUBCHAPTER 2. PRIVATE PLANS

##### 12:21-2.11 Employee consent

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

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

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

#### 12:21-2.12 Evidence of consent

(a) Where employee consent is required pursuant to N.J.A.C. 12:21-2.11, there shall be submitted on the application for approval a statement showing the total number of eligible employees in employment by the employer and the number of employees who agreed to the plan, together [page=1838] with the individual ballots or documents verifying the employees' consent. The ballots or documents of consent, after review by the Division, shall be returned to the employer.

(b) (No change.)

#### 12:21-2.27 Exchange of information

(a) (No change)

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

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

1. (No change)

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

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

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

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

1. (No change.)

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

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

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

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

1. (No change.)

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

3. Names and addresses of other employers in the base year prior to the week in which the family leave commenced, or the week in which the employee submitted a claim for benefits consistent with N.J.S.A. 43:21-39.1(h);

4. (No change.)

### SUBCHAPTER 3. STATE PLAN

#### 12:21-3.2 Notice and proof of family leave

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

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

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

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

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

- ii. The placement of a child into foster care with the individual;
- iii. Periods of leave for scheduled medical procedures, treatments, or appointments for a family member of the individual;  
and
- iv. Periods of leave for scheduled ongoing care of a family member of the individual.

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

#### 12:21-3.3 Filing of claims for benefits

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

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

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

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

[page=1839] 3. Periods of leave for scheduled ongoing care of a family member of the individual.

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

#### 12:21-3.5 Reduction of benefits

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

(c) (No change in text.)

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

#### 12:21-3.6 Concurrent coverage and multiple employers

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

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

#### 12:21-3.9 Notice required from employers

(a)-(e) (No change)

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

1. Name;

2. Address;

3. Social Security number;

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

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

#### 12:21-3.10 Intermittent leave

(a) A covered individual shall 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, including a child who becomes the child of a parent pursuant to a valid written agreement between the parent and a gestational carrier, or placement of a child in foster care.

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

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

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

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

(e) If a covered individual seeks to take intermittent family leave for the purpose described at (d) above, the Division may require the individual to submit a certification that meets the standards specified by subsection c. of section 3 at P.L. 2013, c. 82 (N.J.S.A. 34:11C-3), whether or not the individual's employer has requested such documentation.