

New Jersey Expands Family Leave Protections, Limits Nondisclosure Agreements

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Employers with operations or employees in New Jersey will need to update their policies and practices to comply with new laws relating to family leave and confidentiality agreements.

New Jersey will soon have “the most expansive paid family leave time and benefits in the nation,” Governor Phil Murphy proclaimed. In addition, the newly enacted law relating to disclosure of employment discrimination claims will make many standard terms in employment contracts and settlement agreements null and void.

We review key points of these laws below, which employers can use as a first step toward updating their policies, procedures, and template agreements for employees in New Jersey. Training for human resources professionals and managers also may be required to ensure compliance with these recent developments.

Changes to the New Jersey Family Leave Act (NJFLA)

- ***Smaller Employers Now Covered:***
 - Beginning on June 30, 2019, the employer size threshold will drop from 50 to just 30 employees anywhere (*whether within or outside of New Jersey*), requiring such employers to offer those employees working in New Jersey with 12 weeks of job-protected family leave during each 24-month period and comply with the NJFLA’s anti-retaliation provision. This breaks from the federal Family and Medical Leave Act threshold of 50 employees.
- ***Expansion of Conditions Allowing for Leave Effective Immediately:***
 - An expanded definition of “family member” applies to the NJFLA, allowing employees to take NJFLA to also care for “parent-in-law,” “sibling,” “grandparent,” and “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.”
 - Family leave may be taken in connection with the placement of a child into foster care with the employee and in connection with the birth of a child conceived using a gestational carrier agreement, not just upon the birth or adoption of a child.
 - The NJFLA allows employees to use intermittent leave upon the birth, adoption or foster care placement of a child without the employer’s approval. Prior to the amendment, employees had to take such leave on a consecutive basis unless the employer agreed to allow the use of intermittent leave.
- ***Reduction of Notice Requirement Effective Immediately:***

- The amendment reduces the advance notice requirement from 30 days to 15 days when an employee requests intermittent leave to care for a family member with a serious health condition. For other leave requests, the advance notice requirement remains 30 days.

New Jersey Family Leave Insurance (NJFLI) Expanded:

The NJFLI, which provides cash benefits to employees on family leave under New Jersey's family leave program, also has been amended, with several key changes taking effect July 1, 2020 as follows:

- ***Increased Coverage & Doubled Leave:***
 - The number of weeks of paid leave benefits will increase from 6 to 12 within a 12-month period, the amount of intermittent paid leave benefits will increase from 42 to 56 days in a 12-month period, and intermittent leave will be permitted to be used in the case of foster care placement.
 - The cap on the weekly benefit amount will raise from two-thirds to 85 percent of an employee's weekly salary, to a maximum of 70 percent (up from 53 percent) of the statewide weekly remuneration average, which means the weekly maximum benefit will increase from \$633 per week to \$859 per week in 2020.
 - The amendment will prohibit employers from requiring employees to use up to two weeks of PTO in lieu of NJFLI benefits (but still allows employees to elect to use PTO in lieu of NJFLI benefits). Further, when an employee elects to use PTO benefits, this will no longer reduce the amount of NJFLI benefits available to that employee.
 - Employers can take some comfort in the fact that NJFLI is funded by employee payroll tax contributions, and does not require any additional payments by employers. To fund the expansions noted here, the tax imposed on employees will increase significantly.
- ***Comprehensive Anti-Retaliation Provisions***
 - The amended law contains a comprehensive anti-retaliation provision, prohibiting the discharge, harassment, or any other conduct interfering with the terms and conditions of employment on the basis that the employee requested or took leave. The employer also may not refuse to restore an employee after a period of leave. Significantly, the law provides a private right of action to the employee plus a host of remedies, including monetary damages, attorneys' fees and costs, and injunctive relief and reinstatement to his or her former position. The law also authorizes a schedule of fines that can be imposed by the court.
- ***Seven-Day Waiting Period for NJFLI Eliminated***
 - The amendment eliminates the seven-day waiting period for NJFLI benefits. Formerly, employees did not receive benefits for the first seven days of family leave, unless benefits continued for more than three weeks, in which case the initial seven days were paid retroactively. The amendment eliminates the seven-day waiting period altogether for NJFLI benefits.

New Law Restricts an Employer's Ability to Enter into Non-Disclosure Agreements (NDAs) with Employees, Effective Immediately:

- The new law, known as S. 121, voids "any provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment," as against public policy. Specifically, no right or remedy provided by the New Jersey Law Against Discrimination (NJLAD) —

"or any other statute or case law"—may be prospectively waived. Employers are cautioned that this provision may invalidate mandatory arbitration agreements because they require employees to waive the right to bring a claim in court and have the matter tried before a jury.

- The non-disclosure law makes any term in an employment contract or settlement agreement unenforceable against a current or former employee if it has the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" (such as an NDA). Employers are cautioned that any new or renewed agreements with existing employees must comply with this provision of S. 121 to be enforceable. Note, however, that the law provides some carve-outs and nuances, including that NDAs regarding non-public trade secrets or proprietary information, as well as non-compete agreements, are permissible under the Act. A close reading of the Act also indicates that while it prohibits an NDA regarding "details relating to a claim" of discrimination, retaliation or harassment, it seems to allow an NDA that simply keeps the fact of settlement, the settlement amount, and the "underlying facts" confidential. The apparent breadth and contradiction of this exception, in contrast to the overall prohibition of the Act, likely will require clarification by the courts or through further amendment to the statute.
- S. 121 prohibits retaliation against individuals who refuse to sign agreements containing either waivers or NDAs that are unenforceable under S. 121. In cases of such retaliation, if the employee successfully sues, the employer would then be responsible for attorneys' fees and costs related to the case.
- The Act grants aggrieved individuals a private right of action. Individuals have two years from the accrual of any cause of action to sue in Superior Court, and prevailing plaintiffs may recover a variety of remedies as well as reasonable attorneys' fees and costs.

Action Items for Employers

Given these substantial changes in New Jersey family leave laws and employment contract law, employers should consider these next steps ASAP, as many of these laws already have taken effect:

- **Review and update family leave policies and practices** to comply with the amended laws, noting the different effective dates for different provisions of the law;
- **Review and update employment contracts** and for settlement and severance agreements to ensure the non-disclosure provisions do not violate the new law; and
- **Train your human resources professionals** and others dealing with these issues to ensure they are up to date on the law.

HomansPeck, LLC advises employers on the full spectrum of employment laws, state and federal, and stands ready to assist clients, as needed, on these issues.

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