



12 Weeks = 12 Weeks

Under Family and Medical Leave Law

A recent New Jersey case¹ has clarified whether the twelve weeks of leave provided for by the Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA) may be extended by employer agreement. The court held that the twelve week period could not be extended beyond twelve weeks but that an employer's agreement to extend leave may give rise to a breach of contract claim, despite employee handbook disclaimers. Therefore, the case is favorable to employers with respect to Leave Act claims, and can be used as guidance on how to avoid employment contract claims.

II. Summary of FMLA, NJFLA, and NJ Paid Family Leave Act

Both the FMLA and the NJFLA require employers with fifty or more employees to provide employees with twelve weeks of protected unpaid leave for family and medical leave. The FMLA allows leave for the birth or adoption of a child; care of a family member with a serious health condition; the employee's own serious health condition; or a qualifying exigency arising out of a family member's active duty in the Armed Forces.² The NJFLA allows leave for the birth or adoption of a child or the serious health condition of a family member (but not due to the employee's own serious health condition).³ Although the laws are similar in many respects, there are some significant differences, and New Jersey employers must comply with the requirements of both laws.

The New Jersey Paid Family Leave Act provides six weeks of temporary disability benefits for employees taking leave to 1) care for a newborn or adopted child or 2) care for a family member with a serious health condition.⁴ Unlike the FMLA and NJFLA, there is no minimum number of employees for an employer to be covered.⁵ Similar to the FMLA and NJFLA, an employer may permit or require the employee to take up to two weeks of available paid sick or vacation pay and can reduce the disability payment period by the amount of paid leave provided.⁶ As with substituted vacation and sick pay, the disability payment period runs concurrently with the twelve weeks afforded under the FMLA and NJFLA.⁷

III. 12 Weeks = 12 Weeks B Lapidoth v. Telcordia Technologies, Inc.

Employees who take family or medical leave are entitled to return to their job or a reasonably equivalent job at the end of the twelve weeks.⁸ In Lapidoth, the court addressed

the question of whether an employee is entitled to return to her job under the family leave laws after twelve months in a situation where the employer approved the twelve-month leave. The court held that the FMLA and NJFLA job protections do not extend beyond twelve weeks, even when the employer approves longer leave. Therefore, there was no cause of action under either FMLA or NJFLA, and the court dismissed those claims.

[Further good news for employers: out along with the FMLA and NJFLA claims are claims for recovery of attorney fees and costs to a prevailing plaintiff.]

Notably, the court held that there was a potential cause of action for breach of contract even though the employer classified the employment as at-will. Absent a contract, employment in New Jersey is at-will. At-will employees may be terminated for good cause, bad cause, or no cause at all, unless the termination is based on some prohibited basis (e.g., race, gender, etc).⁹ If there is a contract with an employee, however, the at-will doctrine does not apply; instead the terms of the contract control and the employee may only be terminated according to the terms of the contract.

Whether there is a contract changing the employee's at-will status is a sticky issue in New Jersey. A contract for employment may arise from a company policy, handbook or practice or from a promise made by the employer directly to the employee.¹⁰ In the Lapidoth case, the employer's handbook provided:

This [manual] is not a contract of employment and does not create any contractual rights, either expressed or implied, between the company and its employees...Telecordia employees are employees-at-will....Telecordia has the right to terminate the employment of any of its employees at any time with or without grounds, just cause or reason and without giving prior notice.

Despite that disclaimer, the court held that authorization letters sent by the employer to the employee approving twelve months of leave and guaranteeing reinstatement could be treated as an enforceable prom-

ise that overrode the handbook's disclaimer. The court also held that the employer's prior policy of allowing reinstatement after extended maternity leave could reasonably be interpreted as promising reinstatement.

A. The Good News

The court strictly limited protected Family and Medical Leave job protection to twelve weeks. The court rejected other case law holding that an employer may violate the FMLA and NJFLA when the employer authorizes leave longer than twelve weeks and fails to reinstate the employee upon completion of the approved leave. Further good news for employers: out along with the FMLA and NJFLA claims are claims for recovery of attorney fees and costs to a prevailing plaintiff. The court also highlighted a United States Supreme Court case that invalidated a regulation that prohibited an employer from counting a twelve-week leave toward FMLA time when the employer failed to notify the employee that the leave would count toward the employee's FMLA leave time.

B. The Bad News

Statements and policies in contradiction of the employer's handbook can create contract rights in favor of employees and override a statement in the employee handbook that employment is at-will. In those cases, employers may be held liable if they take action inconsistent with those promises or policies. This may not seem like earthshattering news, but employers beware. If the employer arguably creates a policy (formally or informally), deviation from that policy can create liability on the employer's part for breach of contract. ■

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1. *Lapidoth v. Telecordia Technologies, Inc.*, 420 N.J. Super. 411 (App. Div. 2011).
2. 29 U.S.C.A. § 2612.
3. N.J.S.A. 34:11B-3i.
4. N.J.S.A. 43:21-27(o); N.J.S.A. 43:21-39(b)(2).
5. N.J.S.A. 43:21-27(a)(1).
6. N.J.S.A. 43:21-39.1(c).
7. N.J.S.A. 43:21-26.
8. 29 U.S.C.A. 2614(a)(1).
9. *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 397-99 (1994).
10. *Lapidoth*, *supra*, 420 N.J. Super. at 411.