LAW AND PUBLIC SAFETY

DIVISION ON CIVIL RIGHTS

Rules Pertaining to the Family Leave Act

Readoption with Amendments: N.J.A.C. 13:14

Proposed: March 1, 2021, at 53 N.J.R. 352(a).

Adopted: September 14, 2021, by the New Jersey Division on Civil Rights, Rosemary DiSavino, Deputy Director.

Filed: September 15, 2021, as R.2021 d.115, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 34:11B-16.

Effective Dates: September 15, 2021, Readoption;

October 18, 2021, Amendments.

Expiration Date: September 15, 2028.

Summary of Public Comments and Agency Responses:

The official comment period ended on April 30, 2021. The Division on Civil Rights (DCR) received comments from the following individuals:

1. Christine Buteas

   Chief Government Affairs Officer, New Jersey Business & Industry Association (NJBIA)

2. Cassandra Gomez

   Staff Attorney, A Better Balance (ABB)

3. Yarrow Willman-Cole

   Workplace Justice Program Director, New Jersey Citizen Action (NJCA)

1. COMMENT: NJBIA expresses its concern that the revised definition of "employer" at N.J.A.C. 13:14-1.2, which lowers the threshold from 50 employees to 30 employees, will require the State's smallest employers to provide leave under the New Jersey Family Leave Act (NJFLA). The association thinks this will create operational hurdles that will be difficult to navigate when many businesses remain at partial capacity and are unable to turn a profit.
RESPONSE: The rulemaking incorporates the statutory definition of "employer" as amended by the New Jersey Legislature at P.L. 2019, c. 37. The Division on Civil Rights lacks discretion to change the statute's numerical threshold.

2. COMMENT: NJBIA expresses concern about the definition of "intermittent leave" at N.J.A.C. 13:14-1.2, which includes a proposed rule change that leave "may be scheduled in increments of hours, days, or weeks." The concern is that the change will pose a challenge to employers' operations as they attempt to accommodate intermittent leave scheduled in increments of hours and days. The association notes that the provision conflicts with the Family Leave Insurance program, which does not allow intermittent leave to be taken in increments of hours.
RESPONSE: The amended definition of "intermittent leave" in the rulemaking reflects the New Jersey Legislature's addition of statutory language regarding the increments in which intermittent leave may be taken. As amended at P.L. 2020, c. 23, N.J.S.A. 34:11B-4 allows employees to take intermittent leave for certain triggering events if specific requirements are met and requires them to, "if possible, provide the employer, prior to the commencement of the intermittent leave, with a regular schedule of the day or days of the week on which the intermittent leave will be taken." The previous regulatory definition of "intermittent leave"

required each period of leave to be at least one workweek. The new language at N.J.S.A. 34:11B-4.a(3)j, however, specifically allows intermittent leave to be taken in increments of a day, or days, for leave taken due to an epidemic of a communicable disease, a known or suspected exposure to the communicable disease, or efforts to prevent spread of the communicable disease. Thus, the act now allows intermittent leave to be scheduled in increments smaller than a workweek. A proposal that did not allow intermittent leave to be taken in increments of a day, or days, would be in direct conflict with the statute. DCR's rulemaking allows employees to take leave in increments of hours, so that employees can utilize the leave in increments that are convenient given the new reasons for taking leave. For example, an employee may need to take a half workday of leave to care for that employee's child when the child's school allows the child to attend class in-person for only half of a school day. Additionally, DCR does not believe this proposed amendment will create additional burdens on employers since most are also covered by the Federal Family and Medical Leave Act, which currently requires employers to account for FMLA leave "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour." 29 CFR 825.205.

3. COMMENT: NJBIA supports the rule proposal at N.J.A.C. 13:14-1.5 that allows employers to require "an employee requesting intermittent or reduced leave to provide care for a family member who has been diagnosed with a communicable disease or is suspected of having a communicable disease to work remotely during the time the employee is taking such leave to reduce or eliminate a health or safety risk." The association appreciates the flexibility this will provide to maintain a safe workplace.

RESPONSE: DCR appreciates the support of this change but wishes to clarify that the notice of proposal does not provide a blanket allowance for employers to require employees who take time off to provide care for a family member who has been diagnosed with a communicable disease or is suspected of having a communicable disease to work remotely. Rather, the rulemaking specifies that nothing at N.J.A.C. 13:14-1.5 *precludes* an employer from doing so.

4. COMMENT: ABB and NJCA support the amended definitions of "eligible employee" and "parent," as well as the new definitions of "family leave" and "state of emergency."
RESPONSE: DCR appreciates the support for the amended definitions.

5. COMMENT: ABB and NJCA support the shift in the rules proposed for readoption with amendments from gendered language to gender-neutral language.
RESPONSE: DCR thanks the organizations for their support of this change.

6. COMMENT: ABB and NJCA support the proposed amendments to the definition of "family member." However, they encourage DCR to make further amendments to clarify the scope of certain familial relationship definitions, including adding a definition for "parent-in-law" and clarifying that "sibling" means a "biological, foster, or adopted sibling of an employee or an employee's spouse or domestic partner." The organizations further recommend clarifying how to determine whether an employee has shown that an individual has a close association, equivalent to a family relationship, with the employee, taking into account cultural and/or linguistic differences.

RESPONSE: DCR appreciates the support for the rulemaking. While DCR believes the current definition is broad enough to apply to the family relationships ABB and NJCA wish to include, DCR agrees that clarification would be helpful to ensure all familial relationships clearly fall within the definition. As a result, DCR has changed the definition upon adoption to include individuals related by marriage to the employee.

7. COMMENT: ABB and NJCA recommend removing the caveat in the definition of "closure of a school or place of care" that states it "does not include when the child of an employee may attend the school or place of care, but the employee chooses to provide in-home care or treatment of the child." The organizations state that this exclusion would "put many New Jersey families in a precarious position in light of the public health risks" of COVID-19.

RESPONSE: DCR interprets the New Jersey Legislature's 2020 amendment to the statute to allow family leave to provide treatment or care for a child whose school or place of care is closed to exclude situations where the employee chooses to provide in-home care or treatment of the child. When a child can physically attend school or a place of care, DCR considers the school or place of care to be open to the child.

8. COMMENT: ABB and NJCA recommend amending the definition of "disrupt unduly the operations of the employer." In particular, they take issue with the creation of a presumption that an intermittent or reduced leave schedule for an employee taking leave to provide care for a family member who has been diagnosed with or is suspected of having a communicable disease would unduly disrupt the operations of the employer. They argue the presumption would be a significant restriction for employees who need leave to care for a family member with a

communicable disease. The organizations claim that the presumption is not authorized by, nor consistent with, the statutory language approved by the New Jersey Legislature, which they state does not address such a presumption. Rather, the organizations point out, "the statutory language recognizes the need for intermittent leave, as long as the employee provides prior notice as soon as practicable, provides a schedule prior to taking the intermittent leave *if possible*, and makes 'a reasonable effort' to schedule the leave so as not to unduly disrupt the employer's operations." ABB and NJCA further state that the presumption is "an unusual divergence from usual labor law presumptions, which customarily place burdens of proof on the employer, who has greater access to information." They argue that the employers can better understand and assert what constitutes an undue disruption for their operations and that the presumption does not reflect access to information. They recommend that DCR delete all references to the presumption in the definition and at N.J.A.C. 13:14-1.5.

RESPONSE: DCR proposed this amended definition to account for the additional uses of the terms "intermittent leave" and "reduced leave schedule" in the statute. The new circumstances COVID-19 has created must be taken into account when considering the potential health and safety risks to other employees and members of the public of allowing an employee to take leave from work on an intermittent or reduced leave basis to care for a family member with a communicable disease or in quarantine from being in close contact with someone who has a communicable disease, and allowing that employee to return to the workplace during the same period of intermittent or reduced leave. Allowing an employee who takes leave to care for a family member who has or may have a communicable disease to come into contact with others in the workplace during that leave presents a risk that other employees and members of the public may contract the communicable disease. This may result in additional employees taking leave

and lead to community spread of the communicable disease. DCR believes the rulemaking, as drafted, strikes the correct balance between the interests of the employer and the employee. In doing so, DCR is not creating a presumption that intermittent leave for all reasons is unduly disruptive. Rather, the presumption is narrowly applied only to situations where the reason for, and increments of, the family leave present health and safety risks to those who may come into contact with the employee. In fact, the rulemaking provides that a presumption that an intermittent or reduced leave schedule for an employee taking leave to provide care for a family member would not apply to an employee who does not come into contact with others while working, or who can work remotely.

9. COMMENT: ABB and NJCA oppose DCR's deletion of the phrase "any other person who has been authorized to provide health care by a licensed health care provider" in the definition of "health care provider." The organizations posit that this change would serve as a barrier to certain employees who should be entitled to leave under the statute and creates tension between the Family Leave Act and the Family Leave Insurance program.

RESPONSE: DCR proposed to amend the definition to encompass the statutory definition included in the New Jersey Legislature's recent amendments. DCR does not believe the proposed amendments will have a significant impact on employees' ability to take family leave. The New Jersey Family Leave Insurance statute defines "health care provider" as "a health care provider as defined in the "Family Leave Act," P.L. 1989, c. 261 (C 34:11B-1 et seq.), and any regulations adopted pursuant to that act." Thus, the proposed amended definition does not create a tension between the two laws. Even if it did, though, any difference would be warranted by the statute.

10. COMMENT: ABB and NJCA recommend that the regulations explicitly state that an employer's reason to doubt the validity of certification for leave must be "based on factual evidence." The organizations claim that without this clarification, employees may encounter further obstacles to taking the leave to which they are entitled.
RESPONSE: DCR proposed relocating this existing provision, but not otherwise amending it. This language mirrors statutory language at N.J.S.A. 34:11B-4.e(3)c that has been in the law since before the 2019 and 2020 amendments to the NJFLA.

11. COMMENT: ABB and NJCA state that there is a typo in the proposed amendment language at N.J.A.C. 13:14-1.9(a)3. They recommend deleting the word "determination" in the provision.
RESPONSE: DCR thanks ABB and NJCA for their recommendation and will correct the error upon adoption.

12. COMMENT: ABB and NJCA recommend that DCR issue guidance to explain that suspected exposure to a communicable disease is to be construed broadly and that DCR include a "non-exhaustive list of common scenarios that would qualify as suspected exposure" to assist employees and employers.
RESPONSE: DCR thanks ABB and NJCA for their recommendation and will consider the suggestion as it continues to create NJFLA guidance documents for employees and employers.

Federal Standards Statement

The rules readopted with amendments are intended to clarify and interpret the NJFLA and are not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards, or requirements. The

Federal FMLA allows eligible employees of a covered employer to take up to 12 weeks of job-protected leave in any 12-month period. Under the FMLA, leave may be taken to care for a newborn or newly adopted child, for placement of a child with the employee for adoption or foster care, to care for a family member with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of their job. Effective April 2, 2020, the Federal Emergency Family and Medical Leave Expansion Act provides for paid family leave for a qualifying need related to a public health emergency through December 31, 2020. Under the law, an employee may take leave to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency. To the extent that the adopted amendments provide rights or obligations that exceed similar provisions in Federal law, the NJFLA mandates such provisions.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 13:14.

Full text of the adopted amendments follows (addition to proposal indicated in boldface with asterisks ***thus***; deletion from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 1. GENERAL PROVISIONS

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

13:14-1.2 Definitions

…

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

13:14-1.9 Exemptions

(a) An employer is not required to grant a family leave to any employee who would otherwise be eligible under this Act if:

1.-2. (No change from proposal.)

3. The employer notifies the employee of its decision to deny the leave when *[determination]* that decision is made.

(b) (No change from proposal.)