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ELIZABETH EDUCATION ASSOCIATION

**Legal Issues for School Employees
Family Leave Acts**

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Valença Restaurant**

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Family and Medical Leave Act

FMLA

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- Administered and enforced by the U.S. Department of Labor
- Covers all public employees and a significant amount of private employees
- Effective August 5, 1993
- Contains provisions regarding:
 - Entitlement to leave
 - Maintenance of health benefits
 - Job restoration

Family Leave Act - NJFLA

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- NJ Division of Civil Rights has jurisdiction
- If law is violated:
 - Suit may be initiated in Superior Court
 - Complaint may be filed with Division of Civil Rights on individual or class basis
- After May 4, 1993, all employees covered

Who is eligible?

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Federal

- Anyone employed for at least 12 months and worked at least **1,250** hours during the previous 12-month period

New Jersey

- Anyone employed for at least 12 months and worked at least **1,000** hours during the previous 12-month period

Leave Provisions

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Federal and NJ

- Leave available:
 - To care for a family member with serious health condition
 - For birth and care of a newborn child
 - For placement of a child for adoption or foster care

Federal Only

- Leave available for serious **personal** illness
- Military based leave:
 - Caregiver leave
 - Qualifying exigency leave

SERIOUS HEALTH CONDITION

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Defined under the Acts:

- “Serious Health Condition” - an illness, injury, impairment, or physical or mental condition which requires:
 - Inpatient care in a hospital, hospice, or residential medical care facility;
 - Or continuing medical treatment;
 - Or continuing supervision by a health care provider

Compare to the definition of Sick Leave under N.J.S.A. 18A:30-1:

- “... the absence from his or her post of duty, of any person because of **personal** disability due to illness or injury ...”

Maternity and Child Care

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Federal

- Leave must conclude within 12 months of a child's birth and care, or placement for adoption or foster care



New Jersey

- Leave must begin within one year of the date of the birth or the placement of a newborn or adopted child

Health and Other Benefits

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Federal

- Health benefits continued
- Co-payments paid prior to leave must be paid during leave
- Premiums may be recovered if employee does not return



New Jersey

- Health benefits continued as if the leave was not taken.
- Other benefits may continue if it is the policy to continue the benefits for others on a leave of absence

Leave Period - FMLA

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- Up to 12 weeks in any 12-months (Which 12 months?)
- Spouses with same employer entitled to 12 weeks combined
- Entitlement to leave for birth or adoption expires one year after birth or placement

Leave Period - NJFLA

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- 12 weeks in any 24-month period
- Employer must grant leave to eligible employees from same family who wish to take leave at same time
- Leave for birth or adoption must begin within one year of birth or placement

Leaves may be taken

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- Consecutively
- Intermittently
- Reduced schedule

Intermittent Leave

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- May be:
 - Consecutive
 - Reduced (prescheduled leave which is less than one work week)
 - Intermittent (prescheduled intervals of leave of at least one work week) basis.
- Employee must make reasonable effort not to unduly disrupt employer's operations
- Care for sick family member vs. well child care

Special rules for school employees affect...

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- The taking of:
 - Intermittent leave
 - Leave on a reduced schedule
 - Leave near the end of an academic term
 - Most teachers but not ESP

Leave Limitations for School Employees

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- If intermittent or reduced schedule leave exceeds 20% of work days - may be required to take leave for a particular duration or transfer temporarily to equivalent position
- If leave begins near the end of a term - may be required to continue leave until end of term

Notice of Intent to Take Leave

FMLA

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- When need for leave is foreseeable employees must provide 30-day notice
- In cases of emergency, employee shall provide “such notice as is practicable”
- Leave may be denied for failure to provide written notice

Notice of Intent to Take Leave

NJFLA

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- Requires prior notice of leave “in a manner which is reasonable and practicable”
- Requires employee make a reasonable effort to schedule leave so as not to unduly disrupt operations
- Written notice may be required by policy

Need for Verification

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- Employer may require certification by a duly licensed or state-approved health care provider
- Certification of serious health condition is sufficient if it states:
 - Date condition started
 - Probable length of the condition
 - Medical facts within provider's knowledge
- When the employer has doubts

Return to Work

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Federal

- Employee must:
 - Be restored to original or equivalent position
 - Be provided with equivalent pay, benefits, and other terms and conditions of employment

New Jersey

- Employee must:
 - Be restored to original or equivalent position
 - Be provided with equivalent seniority, status, benefits, pay, and other terms and conditions of employment

Law or CBA?

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- Any state or local law that provides greater leave rights than the rights established under this act cannot be superseded by the **FMLA**
- Collective bargaining agreements may provide greater leave rights but not fewer than those permitted under either law
- Concurrent and consecutive exhaustion of statutory and contractual leave

NJFLIA

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NEW JERSEY FAMILY LEAVE INSURANCE ACT

What is the NJFLIA?

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- Supplement to existing laws
- Not law of leaves
- A law of **insurance** payments
- No job protection unless provided by law, policy, or contract

Who is covered by NJFLIA?

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- Employees eligible for unemployment
 - Must have worked 20 base weeks
 - Earned no less than 20 times minimum wage per week

OR

- 1,000 times minimum wage in the one year prior
- No minimum number of employees per worksite is required

Benefits

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- Up to six (6) weeks of benefit payments during any consecutive 12-month period
- Waiting period - payments begin after the employee has been on leave for seven (7) consecutive calendar days
- If leave lasts more than four (4) weeks (28 calendar days), payment will be made retroactively for the first week
- Allows 42 days of intermittent leave

Compensation

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- Payment will equal $\frac{2}{3}$ of his/her “average weekly wage” up to a maximum of \$681/week (based on 2018 benefit levels)
- Not subject to pension, annuity, or similar types of deductions given by the employer
- Excluded from state income tax

Compensation

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- No pension credit will accrue and seniority will stop accruing after regular salary has stopped for 30 days
- No right to employer-paid health insurance exists unless the NJFLIA payments are:
 - made during a simultaneous usage of FMLA and/or NJFLA leave or
 - the employer is required by contract to maintain the health insurance.

Circumstances for requesting NJFLIA

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- To care for a family member with a serious health condition who is unable to care for himself or herself
- To care for a newborn or newly adopted child
- The leave must be **completed** within 12 months after the birth or adoption.

DEFINITIONS:

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- “Care” is defined by NJFLA, to mean, but is not limited to :
 - Physical care;
 - Emotional support;
 - Visitation;
 - Assistance in treatment;
 - Transportation;
 - Arranging for a change in care;
 - Assistance with essential daily living matters;
 - and personal attendant services

NJFLIA and Intermittent Leave

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- Care for family member – yes
- Care for newborn or newly adopted child – not usually
- If the employer consents to intermittent child rearing leave - must disclose the agreement to the State

Notification Requirements

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- Must provide prior notice to employer in a “reasonable and practicable manner”
- Must provide 15 days notice to their employer for intermittent leave to care for a family member
- Care for newborn or newly adopted child – must provide 30 days notice prior to birth or adoption
- Must notify the State of the claim within 30 days after the leave’s start, with medical certification

Domestic Partners and Civil Unions and NJFLIA

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- The definition of “family member” includes domestic partner or civil union partner
- The definition of “child” includes the child of a domestic partner or civil union partner of the employee

Employee Rights Upon Return

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- No job protection under NJFLIA
- Only if FMLA or NJFLA apply or if a collective agreement does so
- Major jeopardy if not taken with another leave
- No right to sue under NJFLIA

Denial of Benefits

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- State determines eligibility
- Employer approves the leave
- Employee may not be working for pay, even part-time, while receiving NJFLIA payments
- Appeal process is identical to the process used for appealing the denial of unemployment benefits

Funding

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- Funding is entirely employee based; no employer contribution
- Beginning January 1, 2014, employees pay additional tax of .001% of the portion of wages subject up to the statutory maximum used for state Temporary Disability Insurance (approximately \$31,500)
- Payroll deduction per employee - about \$31.50 for 2014
- The tax rate can fluctuate year to year

NJFLIA and FMLA and NJFLA

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- Payments made under NJFLIA run concurrently with leave taken under FMLA and/or NJFLA whichever is applicable
- Take NJFLIA as soon as possible if eligible

Sick Days

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- Employer **may** require an employee to use up to two weeks of unused sick leave, personal leave, vacation leave, illness in the family leave or any other available paid leave days before collecting NJFLIA payments. This is a negotiable topic.
- If full-pay leave days are used, they are applied for the first two weeks of the leave, including the initially unpaid one week NJFLIA waiting period
- Employers can allow the use of accrued paid leave for more than two weeks of family leave, but the additional days do not reduce the available NJFLIA payments
- NJFLIA payments cannot be received while an employee is on full-pay leave days

Differences between NJFLIA and FMLA/NJFLA

- NJFLIA does not guarantee job security
- Only FMLA allows the employee to take time off to care for him/herself
- Only NJFLA includes “parent-in-law” in the definition of “family member” so NJFLIA payments would not be available to care for an “in-law”
- NJFLIA provides state compensation while an employee is on leave, whereas FMLA and NJFLA provide for leave, without compensation

Differences between NJFLIA and FMLA/NJFLA

- Unlike FMLA and NJFLA, NJFLIA does not provide for continuation of health insurance benefits while receiving payments
- NJFLIA and FMLA require that leave to care for a newborn or newly adopted child must be **completed** within 12 months of the birth or adoption
- NJFLA allows leave to care for a newborn or newly adopted child to **begin** at any time within the 12-month period following the birth or adoption as long as it is completed within 24 months of birth

Areas for Potential Negotiation

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- Stacking of leave so leave is not determined to be concurrent by the employer
- Provisions to allow intermittent leave for child-rearing
- Job security for individuals receiving NJFLIA compensation during a family leave not otherwise covered by FMLA or NJFLA
- Creation of a replacement private family disability leave insurance plan with equal to or better benefits than NJFLIA provides

Areas for Potential Negotiation

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- Make the use of other forms of paid leave for family leave purposes optional with the employee
- Provide that the employer will **not** request that an employee's available weeks of NJFLIA payments be reduced by the use of other available forms of paid leave
- Establish a compensation plan to supplement NJFLIA payments so that the total amount received by the employee while on leave equals (but does not exceed) full salary

Areas for Potential Negotiation

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- Negotiate over health insurance during NJFLIA leave to the extent it is not simultaneous with FMLA/NJFLA leave and a carrier will allow it