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VOLUME 40, ISSUE 18

ISSUE DATE: SEPTEMBER 15, 2008

**RULE PROPOSALS**

**LABOR AND WORKFORCE DEVELOPMENT  
DIVISION OF EMPLOYER ACCOUNTS**

40 N.J.R. 5167(a)

**Proposed Amendments: N.J.A.C. 12:16-4.1 and 4.2**

**Proposed New Rules: N.J.A.C. 12:16-1A.1 and 4.11**

[Click here to view Interested Persons Statement](#)

**Contributions, Records and Reports; Family Leave Insurance Benefits**

Authorized By: David J. Socolow, Commissioner, Department of Labor and Workforce Development.

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

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2008-312.

A **public hearing** on the proposed amendments and new rules will be held on the following date at the following location:

Monday, October 6, 2008  
10:00 A.M. to 12:00 Noon  
New Jersey Department of Labor and Workforce Development  
John Fitch Plaza  
13th Floor Auditorium  
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by November 14, 2008 to:

David Fish, Regulatory Officer  
Office of Legal and Regulatory Services

Department of Labor and Workforce Development  
P.O. Box 110, 13th Floor  
Trenton, New Jersey 08625-0110  
Fax: (609) 292-8246

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The agency proposal follows:

### **Summary**

The Department is proposing amendments to N.J.A.C. 12:16-4.1 and 4.2 and new rules at N.J.A.C. 12:16-4.11 and 1A.1. These amendments and new rules would be one component in the Department's overall plan to implement P.L. 2008, c. 17, which amends N.J.S.A. 43:21-25 et seq., the Temporary Disability Benefits Law, extending the temporary disability benefits program, so as to provide to covered individuals what will be referred to as "family leave insurance benefits," a monetary benefit (not a leave entitlement), which protects the covered individual against wage loss suffered because of the need of the covered individual to participate in providing care for a family member who has a serious health condition or to bond with a newborn or newly adopted child.

This notice of proposal contains proposed amendments and new rules within N.J.A.C. 12:16, which concerns contributions to the Unemployment Compensation Fund and the State Disability Benefits Fund, as well as records required to be kept by employers and reports required to be filed by employers relative to those contributions. P.L. 2008, c. 17, requires that, starting January 1, 2009 ("for calendar year 2009"), workers begin making contributions to the State Disability Benefits Fund for the payment of family leave insurance benefits. Family leave insurance benefits, however, will not be paid until after June 30, 2009; that is, P.L. 2008, c. 17, states that claims for family leave insurance benefits shall be paid, subject to the limitations set forth in P.L. 2008, c. 17, for any period of family temporary disability leave taken by a covered individual, which commences after June 30, 2009. Consequently, there is a slightly heightened urgency to publishing the notice of proposal for proposed amendments and new rules within N.J.A.C. 12:16, relating to the remittance of contributions, as opposed to proposed amendments and new rules elsewhere within Title 12 of the Administrative Code, which would address the processing of claims for family leave insurance benefits. The Department intends to follow up this notice of proposal with a notice of proposal in a subsequent issue of the New Jersey Register, which will address the standards and procedures for the filing of family leave insurance benefits claims. This subsequent notice will propose the adoption of an entirely new chapter tentatively titled, "Family Leave Insurance Benefits" and will also contain appropriate proposed new rules and amendments within N.J.A.C. 12:15 and 12:17. It is in this subsequent notice of proposal that the Department will address the issues relating to family leave insurance benefits coverage and the overall scope of the program.

The proposed amendments to N.J.A.C. 12:16-4.1 and 4.2 incorporate family leave insurance benefits into existing rules relating to remuneration and continuation pay.

Proposed new N.J.A.C. 12:16-4.11 sets forth when family leave insurance benefits payments would and would not be considered taxable remuneration under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., specifically, N.J.S.A. 43:21-19(p), which defines "remuneration." The provisions of this new section are similar to existing N.J.A.C. 12:16-4.10, which addresses whether temporary disability benefits payments are or are not considered taxable remuneration under the UCL.

Proposed new N.J.A.C. 12:16-1A.1 defines words and terms, which would be inserted into the chapter by the above-mentioned proposed amendments and new rules, which words and terms are specific to family leave insurance benefits. For example, the proposed new section would include definitions for such terms as "family leave," "family leave insurance benefits," "bonding," and "care." The majority of the definitions are taken verbatim from P.L. 2008, c.

17. However, where necessary, the Department has borrowed definitions from other laws and rules. For example, the definition of the term "care" is identical to the definition for the same term within N.J.A.C. 13:14-1.2, the Division on Civil Rights rules pertaining to the New Jersey Family Leave Act (FLA). In addition, P.L. 2008, c. 17, uses the phrase "incapable of self-care because of mental or physical impairment" within its definition of the term, "child." Since the Federal Family and Medical Leave Act (FMLA) also speaks of individuals who are "incapable of self-care" and contains definitions for that phrase, the Department has chosen to adopt the FMLA definition for "incapable of self-care" within the proposed new rules and amendments. Similarly, the United States Department of Labor (USDOL) regulations at 29 CFR 1630.2(h) contain a definition for the term "physical or mental impairment." The New Jersey Department of Labor and Workforce Development has determined that this particular definition within the USDOL regulations would be appropriate for use in connection with the term "mental or physical impairment" as that term appears within the rules pertaining to family leave insurance benefits.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

The proposed amendments to N.J.A.C. 12:16-4.1 and 4.2 and the proposed new rule at N.J.A.C. 12:16-4.11 would have a positive social impact in that they would make clear to taxpayers when their family leave insurance benefits are considered taxable remuneration under the UCL. The proposed new rule at N.J.A.C. 12:16-1A.1, which sets forth definitions for words and terms used within the proposed amendments and new rules mentioned above, would have a positive social impact in that it would eliminate possible confusion as to the meanings of those words and terms.

### **Economic Impact**

The proposed amendments and new rules would explain when family leave insurance benefits are or are not considered taxable remuneration. Where those benefits are considered taxable remuneration, claimants would obviously be required to pay taxes under the UCL on the benefits; whereas, when they are not considered taxable remuneration, claimants would not be required to pay taxes under the UCL on the benefits. That is the extent to which the proposed amendments and new rules would have an economic impact.

### **Federal Standards Statement**

The proposed new rules and amendments are governed by N.J.S.A. 43:21-1 et seq., as amended by P.L. 2008, c. 17, and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

### **Jobs Impact**

It is not anticipated that the proposed new rules and amendments would have an impact on either the generation or loss of jobs.

### **Agriculture Industry Impact**

It is not anticipated that the proposed new rules and amendments should have an impact on the agriculture industry.

### **Regulatory Flexibility Statement**

The proposed new rules and amendments simply add family leave insurance benefits payments to the discussion within N.J.A.C. 12:16 of remuneration and taxable remuneration. They impose no reporting, recordkeeping and other compliance requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

**Smart Growth Impact**

The proposed new rules and amendments would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

**Housing Affordability Impact**

The proposed new rules and amendments would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new rules and amendments have nothing whatsoever to do with housing.

**Smart Growth Development Impact**

The proposed new rules and amendments would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules and amendments have nothing whatsoever to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

**SUBCHAPTER 1A. DEFINITIONS****12:16-1A.1 Definitions**

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

**"Bond" or "Bonding" with a newborn child or newly adopted child means to develop a psychological and emotional attachment between a child and his or her primary caregiver(s). The development of this attachment or bond between child and caregiver(s) requires being in one another's presence.**

**"Care" means, 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.**

**"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, who is less than 19 years of age or is 19 years of age or older but incapable of self-care because of mental or physical impairment.**

**"Civil union" means a civil union as defined in N.J.S.A. 37:1-29.**

**"Domestic partner" means a domestic partner as defined in N.J.S.A. 26:8A-3.**

**"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; or**

**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 the first 12 months after the placement of the child for adoption with the individual.**

"Family leave" does not include any period of time during which a covered individual is paid temporary disability benefits pursuant to N.J.S.A. 43:21-25 et seq. (the New Jersey Temporary Benefits Law), 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 child, spouse, domestic partner, civil union partner or parent of a covered individual.

"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 providing care for a family member or to bond with a newborn or newly adopted child.

"Incapable of self-care," solely for the purpose of defining the term "child," means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities, such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

"Physical or mental impairment," solely for the purpose of defining the term "child" means:

1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
2. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Private plan" means a private plan approved by the Division as defined in N.J.S.A. 43:21-32.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition, which requires:

1. Inpatient care in a hospital, hospice, or residential medical care facility; or
2. Continuing medical treatment or continuing supervision by a health care provider.

As used in this definition, "continuing medical treatment or continuing supervision by a health care provider" means:

1. A period of incapacity (that is, inability to work, attend school or perform regular daily activities due to a serious health condition, treatment therefore and recovery therefrom) of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- i. Treatment two or more times by a health care provider; or
- ii. Treatment by a health care provider on one occasion, which results in a regimen of continuing treatment

**under the supervision of a health care provider;**

**2. Any period of incapacity due to pregnancy, or for prenatal care;**

**3. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition;**

**4. A period of incapacity, which is permanent or long-term, due to a condition for which treatment may not be effective (such as Alzheimer's disease, a severe stroke or the terminal stages of a disease) where the individual is under continuing supervision of, but need not be receiving active treatment by a health care provider; or**

**5. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity or more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy) or kidney disease (dialysis).**

**"Minor" means a person under the age of 18.**

**"Week" means a period of seven consecutive days.**

**"12-month period" means, with respect to an individual who establishes a valid first claim for family leave insurance benefits, the 365 consecutive days that begin with the first day that the individual establishes the claim.**

#### SUBCHAPTER 4. REMUNERATION

##### 12:16-4.1 Remuneration defined

(a) (No change.)

(b) The following remuneration issues are discussed in N.J.A.C. 12:16-4.2 through [4.17] **4.18**.

1.-15. (No change.)

16. Deferred payments; [and]

17. Co-employed individuals, employee leasing clients[.]; **and**

**18. Family leave insurance benefits payments.**

##### 12:16-4.2 Sick leave payments **and continuation pay for family leave**

(a) Sick leave payments (also known as continuation pay) **and continuation pay for family leave** made by employers to employees for periods of disability **or for periods of family leave** are wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes.

(b) Those types of sick leave payments **and continuation pay for family leave** deemed wages and therefore taxable are:

1.-3. (No change.)

4. Payment of unused sick leave made to an employee while still in employment[.];

**5. Payment of the difference between family leave insurance benefits paid under the State plan or an approved private plan and full salary.**

(c) Those types of sick leave payments **and continuation pay for family leave** deemed benefits and therefore non-taxable are:

1.-6. (No change.)

7. Payment of sick leave made after retirement or separation from employment[.];

**8. Family leave insurance benefits paid from the State plan;**

**9. Family leave insurance benefits paid by an insurance carrier under an approved private plan (see N.J.A.C. 12:16-4.11 for exceptions);**

**10. Family leave insurance benefits paid by a union under an approved self-insured private plan (see N.J.A.C. 12:16-4.11 for exceptions); and**

**11. Family leave insurance benefits paid by the employer under an approved self-insured private plan (see N.J.A.C. 12:16-4.11 for exceptions).**

**12:16-4.11 Family leave insurance benefits payments**

**(a) Family leave insurance benefits payments made to employees under an approved private plan shall be considered taxable remuneration if the payments are for a period of seven or less consecutive days following the first day that the individual establishes a claim.**

**(b) Family leave insurance benefits payments made for periods after the seventh consecutive day following the first day that the individual establishes a claim shall not be considered taxable remuneration.**

**(c) Family leave insurance benefits payments made for seven or less consecutive days following the first day that the individual establishes a claim referred to in (a) above would not be considered taxable remuneration when:**

**1. The period during which family leave insurance benefits have been paid extends to 22 consecutive days, or**

**2. The claimant is eligible for at least one day of family leave insurance benefits in three separate weeks subsequent to the week in which the claim for family leave insurance benefits was established.**

Recodify existing 4.11 through 4.17 as **4.12 through 4.18** (No change in text.)