

CONTRACTING TOPICS

INSIDE THIS ISSUE:

Johnson & Conway, **2**
LLP

**Johnson & Conway,
LLP**

Attorneys at Law

- **New Jersey Office**

18 Sycamore Avenue
Ho-Ho-Kus, NJ 07423
(201) 447-5600

- **New York Office**

307 7th Avenue
Suite 2001
New York, NY 10001

Web site:
www.constructionlawyers.
us

HANDLING INJURY, DISABILITY AND FAMILY LEAVE

Injured and disabled workers and family emergencies have become a major focus of a complex assortment of New Jersey and federal laws designed to shield workers.

Occasionally, these laws have become a sword in the hands of workers, sometimes justifiably and sometimes in an effort to obtain undeserved benefits.

Every employer, therefore, should have some familiarity with the most important laws so that it knows how to apply them, or, at least know when to seek guidance on close cases.

New Jersey's 90 year old **Worker's Compensation Statute** is the oldest law. While its daily workings are well known to employers, they should also be aware that the statute prohibits discrimination or retaliation against a worker because he or she has claimed compensation benefits. N.J.S.A. §34:15-39.1. This provision can present a problem where the employer wishes to discharge the employee for cause (such as excessive absenteeism), but the employee happens to have filed a worker's compensation claim. The employer must, therefore, carefully document that the discharge was not retaliatory.

New Jersey's most far reaching statute is its **Law Against Discrimination** (N.J.S.A. §10:5-1 et seq.). To recover, an employee must show that he is handicapped (defined to include injury and illness), that he was performing to a level that met his employer's legitimate expectations, that he was nevertheless fired, and that the employer sought someone to fill the position afterwards. Under applicable regulations, the employer must make a "reasonable accommodation" to the worker's condition. This may include light duty work if the employee comes to work or a reasonable, but not indefinite, leave of absence. However, where the employee has certified that he or she is not able to return to work, which would be the case for someone receiving disability benefits under the **Temporary Disability Benefits Law** (N.J.S.A. §43:21-25 et seq.), then a court would probably rule that the employee was not covered by the LAD. Of course, the LAD extends beyond physical disability to prohibit discrimination, harassment, etc.

The federal equivalent of the LAD is the **Americans**

with Disabilities Act (42 U.S.C. §12101 et seq.), which applies to employers with 15 or more employees and covers "any individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." Recognized disabilities may include such conditions as depression and diabetes. As with the LAD, an employer is required to make a reasonable accommodation to the disability. However, this does not mean that the employer, must, for example, create light duty jobs, where none exist, or where a collective bargaining agreement fills such jobs on the basis of seniority.



Because employee rights can also arise out of an **employee handbook** or a **collective bargaining agreement**, the employer should be careful to check its terms before making a decision regarding an employee. Generally, the terms of a collective bargaining agreement which pre-exist a particular disability and which have been applied in a non-discriminatory manner, will be upheld by the courts.

HANDLING INJURY, DISABILITY AND FAMILY LEAVE (CON'T)

For example, a court should enforce the terms of a collective bargaining agreement that limit the duration of an employee's absence from work. However, the employer must take care to determine that enforcement of a collective bargaining agreement or conditions in an employee handbook do not run afoul of any specific statute such as the state and federal family leave acts discussed below.

The federal **Family Leave and Medical Act (FMLA)** (29 U.S.C.A. §2601 et seq.) applies to employers with 50 or more employees. Under the Act, eligible employees (employed for a year and working at least 1250 hours) are entitled to 12 weeks of leave in any 12-month period. The permitted reasons are: 1) care for a newborn child, 2) placement of a child with the employee for adoption or foster care, 3) care for an immediate family member with a serious health condition, and 4) the employee's own serious health condition

that makes the employee unable to perform the functions of his or her position. The leave may be unpaid leave and the employer may require the employee to use accrued paid vacation, personal leave and sick leave. It is also important for the employer to designate any leave under this act as FMLA leave when it starts because it cannot do so retroactively. 29 C.F.R. §825.208.

For example, if an employee takes a 90 day leave under a company policy or collective bargaining agreement and the employer fails to designate it to the employee as FMLA leave, the employee will be entitled to an additional 90 days under the FMLA.

New Jersey's equivalent is the **Family Leave Act** (N.J.S.A. §34:11B-1 et seq.).



The major distinction between the state statute and the FMLA is that the New Jersey version does not apply to leave required by the worker's own illness. However, if an employee takes leave under one of the first three categories listed above for the FMLA, the employer should take

care to designate it as leave under the state statute as well as FMLA leave.

Unfortunately, not only is each of these laws complex to apply by itself, largely because "reasonableness" depends on the facts of each situation, but application is even more difficult where the laws overlap. One thing is clear. Courts, look very unfavorably on retaliatory or discriminatory application of leave policies, so it is important for every employer to have in place well thought out policies before the need arises.

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JOHNSON & CONWAY, LLP

Johnson & Conway, LLP is a law firm serving public and private clients in the construction industry throughout New Jersey. Its three partners, **Geoff Johnson, John Napolitano** and **William "Mickey" Conway** have a total of 45 years of legal experience working with small and large construction firms as well as construction professionals. In addition, John Napolitano has a background in engineering and is a licensed engineer.

We handle a wide range of matters including contract review and negotiation, corporate counsel and succession planning, employment disputes, and litigation, both complex and small before the courts and regulatory bodies.

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