

OUR INSIGHTS

New York Proposes Regulations on State Paid Family Leave Law

Authors: Allison E. Ianni (New York City), Shabri Sharma (New York City)

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As we previously reported, the New York State Paid Family Leave Law (PFL) will go into effect on January 1, 2018, and will require virtually all private employers in New York to provide paid family leave benefits to eligible employees. (Public employers are not required to participate, but may opt in to the program.)

On February 22, 2017, the New York State Workers' Compensation Board (WCB) published [proposed regulations](#) that explain and clarify many aspects of the PFL, including, among other things, employers' rights and responsibilities in providing paid family leave, employee eligibility for such leave, and the phase-in schedule of the PFL program. At the same time, the state introduced a [new informational website](#) to provide guidance regarding the PFL to employers, employees, and medical providers, and launched a hotline at the following phone number: (844) 337-6303.

Below is a summary of the key components of the proposed regulations along with some highlights from the state PFL website. The public comments period for the proposed regulations will be open until April 8, 2017. It is likely that the regulations, with possible revisions, will be adopted prior to July 1, 2017.

Employer Coverage

Pursuant to the PFL, all private employers with at least one employee will be required to provide paid family leave benefits to their employees by purchasing a paid family leave insurance policy or electing to self-insure. The premium for such policies will be fully funded through employee payroll deductions. The proposed regulations explain that employers may begin collecting weekly employee contributions as early as July 1, 2017, to fund paid family leave benefits beginning on or after January 1, 2018. While the proposed regulations do not indicate a maximum employee contribution amount, the state website indicates that such amount is expected to be set by July 1, 2017.

Employee Eligibility

The proposed regulations clarify that employees who have been employed by a covered employer full-time for at least 26 weeks or part-time for at least 175 days at the time they apply for benefits will be eligible for these paid family leave benefits. For purposes of the PFL, part-time employees are those who are scheduled to work fewer than five days per week. Notably, the state's informational website clarifies that both non-U.S. citizens and undocumented employees who otherwise meet eligibility

requirements are eligible for paid family leave under the PFL.

Under the proposed regulations, an employee whose regular work schedule is less than 26 weeks or 175 days in a consecutive 52-week period “shall be provided the option to file a waiver of family leave benefits,” which would exempt the employee from the obligation to make PFL payroll contributions. The employer similarly would be exempt from the obligation to provide PFL benefits for the employee who waived PFL benefits.

Implementation

The PFL program will be phased in over four years, beginning on January 1, 2018. The proposed regulations explain that eligible employees will receive a portion of their weekly earnings during a qualifying leave period, subject to a New York state average weekly wage (NYSAWW) level cap, based on the following schedule:

Year	Maximum Duration of Leave in a 52-week period	Employee’s Weekly Earnings to be Paid During Leave	NY State Average Weekly Earnings Cap
January 1, 2018	8 weeks	50 percent	50 percent
January 1, 2019	10 weeks	55 percent	55 percent
January 1, 2020	10 weeks	60 percent	60 percent
January 1, 2021	12 weeks	67 percent	67 percent

For instance, an eligible employee could take a maximum of 8 weeks of paid family leave in the 52-week period from January 1, 2018, to December 31, 2018. During the employee’s 8-week leave period, the employee would be eligible for the lesser of 50 percent of the employee’s weekly earnings or the NYSAWW. The NYSAWW is updated annually on July 1 and currently is \$1,296.48.

A part-time employee’s maximum period of paid family leave may be reduced by the average number of days worked per week as a percentage of the total benefit available for full-time workers. For example, on January 1, 2018, a part-time employee who worked 3 days per week would be eligible to receive 60 percent of the 40 day (8 week) total available to a full-time worker, or 24 days maximum in any 52-consecutive week period.

Importantly, the proposed regulations clarify that the 52-week period for calculating an employee’s leave time would be computed *retroactively* with respect to each day for which benefits are currently being claimed. That is, the PFL regulations would adopt a “rolling backward” method of calculating available time off, which could lead to some administrative hurdles for employers that currently use a

different method for computing employees' leave under the Family and Medical Leave Act (FMLA).

Use of Paid Family Leave

Eligible employees may use paid family leave for purposes similar to those provided by the FMLA:

- to provide care for family members with serious health conditions. The definition of close family member under the PFL is slightly more expansive than the FMLA's, and according to the state's informational website, includes a spouse, domestic partner, child, parent, parent-in-law, grandparent, or grandchild;
- to bond with a newborn during the first 12 months following the birth or adoption of the child, *even if* the child was born or placed for adoption prior to January 1, 2018;
- to meet birth, adoption, or foster care obligations (including absences required for adoption and foster care placements); and/or
- to attend to a qualifying exigency (as defined under the FMLA) arising from the service of a family member in the Armed Forces of the United States.

Significantly, unlike the FMLA, the PFL does not provide for paid leave benefits due to an employee's own serious health condition. Employees may, however, be eligible to receive state statutory short-term disability benefits during such periods.

The proposed regulations provide that, as under the FMLA, employees must provide notice to their employers of their intent to take paid family leave. Specifically, employees seeking to take paid family leave for foreseeable qualifying events must provide 30 days' notice to their employer, or where a qualifying event is unforeseeable, as soon as practicable. The employee need not expressly assert his or her rights under the PFL or even mention family leave in order to trigger an employer's obligation to seek further information to determine whether the employee is seeking paid family leave.

The regulations further describe the types of documentation that employers may ask for in support of such requests for leave, and explain that if spouses have different employers, they are both eligible to take paid family leave at the same time. However, if both spouses work for the same employer, the employer may deny paid family leave to more than one employee at the same time to care for the same family leave recipient or to bond with a child.

Not surprisingly, the PFL regulations make clear that employers may not discriminate or retaliate against an employee for taking paid family leave.

Other Employer Obligations

Designation of FMLA Leave

The proposed regulations indicate that employers that wish to concurrently designate an employee's FMLA leave and PFL time must notify the employee of such designation and provide the employee with the notice required under the FMLA regulations. If an employer fails to provide such notice, the employer will be deemed to have permitted the employee to receive New York family leave benefits

without concurrently using the benefits available under the FMLA.

Continuation of Health Benefits and Job Restoration

The proposed regulations provide that, similar to the FMLA, employers must continue to provide health insurance to employees on paid family leave, subject to an employee's usual contribution to the cost of the premium. The proposed regulations also would require employers to restore an employee who takes leave to the same or a comparable position without losing the benefits the employee would have accrued if he or she had not taken leave.

Offsetting Paid Family Leave

The proposed regulations indicate that, unlike under the FMLA, employers may not require employees to charge any portion of their leave time to unused paid time off (i.e., to offset any portion of the employee's leave time during which they may be paid less than full salary). However, employers may offer that option to employees, and where an employee elects to use his or her paid time off, the employer may request reimbursement out of any family leave benefits due, or to become, due by filing a claim for reimbursement with its insurance carrier prior to the carrier's payment of the family leave benefits.

Notice and Posting Obligations

The proposed PFL regulations specify that employers must provide information to employees about paid family leave in an employee handbook or other written policy. If an employer does not have an employee handbook or other written guidance describing employee benefits and leave provisions, the employer still must provide written guidance to each of its employees concerning employees' rights and employers' obligations under the PFL. The written guidance should include information on how to file a claim for paid family leave.

The proposed regulations further provide that employers must post a written notice concerning the PFL in plain view where all employees and applicants can readily see it. A notice form will be issued by the chair of the WCB for this purpose.

Collective Bargaining Agreements

Under the proposed regulations, employers may be relieved from providing PFL to employees who are covered by a collective bargaining agreement (CBA), provided that the CBA provides benefits at least as favorable as those set forth in the regulations. The CBA may not permit an otherwise eligible employee to waive his or her right to paid family leave, but it may provide different rules related to the use of paid family leave than those provided by the regulations.

Penalties and Remedies

The proposed regulations provide that any dispute related to a claim for New York paid family leave, including those with respect to employee eligibility, benefit rates, and duration of paid leave, is subject to arbitration pursuant to New York Workers' Compensation Law Section 221. Furthermore the PFL regulations, if adopted, provide for significant penalties for violations of the PFL, including but not limited to the following:

- Employers that fail to provide paid family leave coverage as of January 1, 2018, would be liable for a fine of up to 0.5 percent of weekly payroll for the period the employer was without coverage and a fine of up to \$500 to be paid into the Special Fund for Disability Benefits.
- Employers that fail to collect employee contributions to provide for paid family leave benefits and fail to provide paid family leave coverage will be directly liable to employees for the payment of family leave benefits and employee contributions for the period of the violation.
- Employers that fail to provide health insurance while an employee is on paid family leave will be directly liable for the employee's medical costs while on leave.

Next Steps

New York employers may want to contact their disability insurance providers and begin reviewing their payroll and leave policies and practices—in particular, their existing FMLA policies now—to ensure compliance with the upcoming paid family leave law.

Stay tuned for further updates regarding the adoption of the proposed regulations and forthcoming form notices to be provided by the WCB.

Allison E. Ianni (New York City)



Allison Ianni is Of Counsel in the New York City office of Ogletree Deakins, where she represents and advises management in all aspects of employment law. Ms. Ianni regularly defends employers against claims of discrimination, harassment, retaliation, and wage and hour violations, in state and federal courts and before administrative agencies and arbitration panels. In particular, she has represented clients in the media, higher education, insurance, hospitality, and consulting industries. Ms...

Shabri Sharma (New York City)



Shabri Sharma is an Associate in the New York City office, where she represents and advises management in all aspects of employment law. Ms. Sharma has experience in advising and counseling employers regarding employment discrimination claims, mandatory arbitration policies, independent contractor audits, terminations, severance agreements, recent legal developments, and other related employment issues. Ms. Sharma also delivers employment training to hundreds of employees. Prior to joining...
