

New Paid Family Leave Benefits for New York Employees: What Employers Need to Know

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New York's Paid Family Leave Benefits Law (PFL) will provide broad paid family leave benefits through the state's existing Disability Benefits Law for all employees who have worked at least 26 consecutive weeks (or 175 days for part-time employees) for the employer. The law also will provide such employees with the right to a leave of absence and guaranteed reinstatement even if they are not protected by the Family and Medical Leave Act (FMLA).

The new law will require employers to review their family and medical leave policies, benefit claim procedures and processes, employment agreements, and collective bargaining agreements (if any) to ensure full compliance. Employers have some time to prepare, as the new law will not become effective until January 1, 2018. PFL benefits will be funded exclusively through employee contributions deducted from payroll beginning in July 2017.

The Paid Family Leave Benefits Law is a result of a bill enacting New York State's 2016-2017 Budget signed by Governor Andrew Cuomo.

Proposed regulations released by the [Workers' Compensation Board](#) ("the Board") and the [Department of Financial Services](#) on February 22, 2017, provide guidance to employers, insurance carriers, and employees to clarify employee rights to benefits and a leave of absence (including the right to reinstatement) and responsibilities, as well as penalties for violations, under the PFL. The public comment period on the proposed regulations ends April 8, 2017.

Employee Eligibility

Reasons to Take Paid Leave

The new law provides three specific situations for when employees who have worked for the employer for 26 consecutive weeks will be entitled to a paid leave of absence from work under the PFL:

1. When paid leave is necessary to provide care, including physical or psychological care, to their family members due to a family member's serious health condition;
2. To bond with their newborn children during the first year of the child's life, or, in the case of adoption or foster care placement, for the first year after the placement of a child with the employee; and
3. For any qualifying reason as provided for under the federal Family and Medical Leave Act arising from the employees' spouse, domestic partner, child, or parent being on active military duty, or, alternatively, being notified of an impending call or order to active military duty.

Similar to short-term disability benefits, the proposed regulations require an employee to make a request for PFL to the insurance carrier that administers the PFL plan, or to the self-insured employer, and supply copies of supporting documentation (*e.g.*, a birth certificate or medical certification) that gives the details surrounding the family leave requested. (The Board proposed regulations provide that public employers and some small business employers may opt to self-insure PFL benefits.) While the Board will promulgate a form that meets the requirements of the statute and the regulations, the insurance carrier or self-insured employer may accept the filing of this request in another format, such as by phone or electronic portal.

Employers should start preparing for these new requirements by reviewing and revising current

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policies and practices and creating new comprehensive policies to ensure full compliance with the law's requirements, including the leave of absence and job reinstatement provisions.

Employee Request for PFL

When the need for family leave is foreseeable and based on an expected birth, adoption, or foster care placement, the employee must provide the employer with not less than 30 days' notice, before the date the leave is to begin, of his or her intention to take family leave. However, if the date of the birth or placement requires leave to begin in less than 30 days, the employee must provide such notice as is practicable.

Similarly, and consistent with the FMLA, when the need for family leave is foreseeable and based on planned medical treatment, the employee must provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take family leave. Once again, however, if the date of the medical treatment requires leave to begin in less than 30 days, the employee must provide such notice as is practicable.

When Employee is on Paid Leave

Paid Benefit Levels

PFL benefits will be increased annually until January 1, 2021. (The State Superintendent of Financial Services will have discretion to delay the increases in the family leave benefit level if such increases will have a negative impact on the state's economy.) Once effective, for any 52-week calendar period, the length of maximum available leave benefits, and amount of weekly benefits, to the employee will be as follows:

- *January 1, 2018*: 8 weeks paid at 50% of the employee's average weekly wage or 50% of the state average weekly wage, whichever is less;
- *January 1, 2019*: 10 weeks paid at 55% of the employee's average weekly wage or 55% of the state average weekly wage, whichever is less;
- *January 1, 2020*: 10 weeks paid at 60% of the employee's average weekly wage or 60% of the state average weekly wage, whichever is less; and
- *January 1, 2021*: 12 weeks paid at 67% of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less.

The New York State Average Weekly Wage (NYSAWW) is set every year after a comprehensive analysis by the New York State Department of Labor (NYSDOL). The NYSDOL's Research and Statistics Division computed the NYSAWW for calendar year 2015 to be \$1,296.48. The determination is made based on the prior calendar year wages reported by the Commissioner of Labor to the Superintendent of Financial Services on March 31 of each year.

Employees, at their option, may supplement PFL benefits up to their full salary or wages with accrued vacation, or personal leave time during the paid leave, enabling him or her to receive full salary. Should an employee choose to use paid vacation or personal time for statutory leave, the employer may request reimbursement from the employee for any paid leave benefits the employee received from the state during that period.

The Board proposed regulations state that when employees of a covered employer are entitled to received PFL leave benefits under a collective bargaining agreement that are "at least as favorable" (as defined), the employer will be relieved from providing PFL benefits under the PFL. Further, the proposed regulations state that any employee may file a waiver of family leave benefits.

If an employer's current practice involves paying employees full salary while they are out on family leave, the employer will be entitled to seek reimbursement from the carrier providing PFL benefits in the same manner as if it were seeking reimbursement for workers' compensation benefits.

Cost of PFL

The PFL should not impose significant costs on New York employers, employees, or insurance carriers. The proposed regulations work to implement the statute, while avoiding any costs above what the law requires. The maximum employee contribution, to be set by the Superintendent of Financial Services, should be a modest deduction from each employee's paycheck. The proposed regulations further provide that the cost of the premium for the addition of paid family leave to an employer's disability benefits policy will be covered in total by the employee's contribution.

Benefits During PFL

Consistent with the FMLA, during any period of PFL, employers must maintain the employee's existing health benefits for the duration of PFL as if the employee had continued to work (note that for a plan funded by insurance, this will require an amendment to the state insurance law mandating compliant

policy provisions and would arguably be unenforceable as preempted by ERISA for a self-insured plan).

Similar to other laws providing job-protected leave, the new law requires employers to reinstate employees returning from PFL to his or her prior position of employment (or to a comparable position with comparable pay, benefits, and other terms and conditions of employment). In addition, the taking of paid leave under the new law must not serve to reduce any of the employee's accrued benefits at the time of taking such leave.

However, the new law in and of itself does not entitle employees who take leave to continue to accrue benefits, such as sick or personal days, while out on leave. This also includes accrual of any seniority rights to which the employee may have been entitled if he or she did not take the leave. Accordingly, it is important for employers to review their existing policies or agreements to determine how accruals of benefits are treated with other forms of leave. In an effort to avoid any adverse claims, employers should utilize a consistent policy for all forms of leave, with an eye to any laws governing other forms of leave. In addition, if an existing collective bargaining agreement provides for the accrual of benefits such as this while out on leave, the new law will not serve to limit such terms and conditions.

Restrictions on Taking PFL

Employees may not collect benefits for short-term disability required by New York State law and PFL concurrently. Additionally, employees who also are eligible for disability benefits may receive only a combined amount of 26 weeks of disability benefits and PFL benefits in a 52-consecutive calendar week period.

Other situations in which PFL benefits may not be payable include when the employee is:

- Receiving total disability payments pursuant to a claim for workers' compensation, volunteer firefighters' benefits, or volunteer ambulance workers' benefits;
- Not employed or is on administrative leave from his or her employment;
- Collecting sick pay or paid time off from the employer;
- Works at least part of that day with pay for the employer or for any other employer; and
- Using the same period of family leave to care for the same family member in question.

In addition, unless otherwise expressly permitted by the employer, leave available under the FMLA runs concurrently with PFL. For a subsequent, unrelated disability, an employee may seek benefits up to the maximum number of available weeks permitted.

Enforcement

The Board proposed regulations provide that an employee who believes he or she has been discriminated or retaliated against for taking PFL may file a claim under Section 120 of the Workers' Compensation Law.

What Should Do Employers Now

While PFL should not impose a direct cost on employers, PFL benefits will be administered in a similar manner as the way short-term disability benefits are administered. Initially, all employers must be aware that the proposed regulations require employers to display or post a notice in plain view where all employees and applicants can readily see it with information about PFL, including on how to file a complaint. If many of the employer's employees do not read and write in English, the notice also must be in a language in which the employees can read and write. Further, employers must follow all federal and state laws for notices provided to sensory-impaired individuals. Employers also must commence the deductions for the fund in mid-2017 and ensure appropriate processes are implemented to do so.

In addition, employers should review their current short-term disability claims procedures to assess adjustments that may be needed or desirable to administer employee claims for PFL benefits. Employers also should begin to review the leave provisions and practices of their current policies and procedures. The new Paid Family Leave Benefits Law will not come into effect until January 1, 2018; however, employers may be well-served by preparing for this new law now.

Jackson Lewis attorneys are available to provide strategic guidance and to assist in interpreting the new law and in implementing or reviewing any requisite policies, providing additional guidance, and negotiating necessary agreements to ensure full compliance with the law. Please contact a Jackson Lewis attorney with any questions.

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