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Final New York Paid Family Leave Regulations Released: What Employers Need to Know

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The Workers' Compensation Board adopted the final regulations for New York's new Paid Family Leave Benefits Law (PFL) on July 19, 2017. Final Regulations were issued previously by the Department of Financial Services on May 16, 2017.

PFL will provide broad paid family leave benefits through the state's existing Disability Benefits Law. In addition to paid benefits, eligible employees have the right to a leave of absence and guaranteed reinstatement even if they are not protected by the Family and Medical Leave Act (FMLA).

PFL is a result of a bill signed by Governor Andrew Cuomo enacting New York State's 2016-2017 Budget. PFL will go into effect on January 1, 2018.

The following summarizes some of PFL's key provisions as clarified by the Final Regulations.

Detailed information on the final regulations can be found on the New York Worker's Compensation Paid Family Leave webpage.

Employee Eligibility Criteria

PFL will cover employees whose regular employment schedule is at least 20 hours per week and have worked at least 26 consecutive weeks before the first full day of family leave begins. In addition, part-time employees whose regular employment schedule is less than 20 hours per week will be eligible for benefits under the law after such part-time employee has worked for 175 days for the employer. The Assessment of Public Comments to the final regulations make clear that the 175 days are not calendar days, but days worked. In addition, the Board's Final Regulations were revised to clarify that employers must provide employees the option to sign a waiver if their regular work schedule will never achieve the period required (26 weeks or 175 days in a 52 consecutive week) to become eligible for PFL.

Reasons to Take Paid Leave

PFL provides that eligible employees will be entitled to a paid leave of absence from work in three specific situations:

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 employee's 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.

Benefits Received During Leave

Paid Benefits

Under PFL, eligible employees can apply for paid leave, the amount of which 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

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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 2016 to be $1,305.92. 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.

Employers and employees can agree to allow the employee to supplement PFL benefits up to their full salary or wages with accrued vacation, sick, personal, or other paid time off during the paid leave, enabling him or her to receive full salary. Should an employer offer and an employee choose to use paid vacation, sick, personal, or other paid time off for statutory leave, the employer may request reimbursement from the carrier providing PFL benefits in the same manner as if it were seeking reimbursement for workers' compensation benefits. Similarly, 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 in the same manner.

Continued Health Insurance

Similar to 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 (for a plan funded by insurance, this will require an amendment to the state insurance law mandating compliant policy provisions and, arguably, would be unenforceable as preempted by ERISA for a self-insured plan).

Job Protection

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.

Employer Notice Obligations

Employers must provide written guidance to all employees regarding their rights and obligations under the PFL, including how to file a claim for PFL. Such guidance must be contained in an employee handbook if an employer maintains one. In addition, all employers must display or post a notice concerning PFL in the form prescribed by the Workers' Compensation Board Chair.

Employee Notice Obligations

The Final Regulations clarify an employee's notice obligations. When the need for family leave is foreseeable, employees must provide the employer at least 30 days' advance notice of their intention to take family leave. The Regulations describe foreseeable qualifying events as expected birth of a child, placement of a child for adoption or foster care, planned medical treatment, or military exigency. The Regulations further provide that if giving 30 days' advance notice is not practicable because of a lack of knowledge of the approximate date leave will need to begin, a change in circumstances, or a medical emergency, employees must notify their employer as soon as it is practicable. Similar to the FMLA, the Final Regulations state that it should generally be practicable to advise an employer of the need within the time prescribed by the employer's usual and customary notice requirements.

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/or
- Using the same time for the same family member in question if spouses are employed by same employer.

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In addition, unless otherwise expressly permitted by the employer, leave available under the FMLA can run concurrently with PFL, provided the employer gives the employee the required FMLA notices. For a subsequent, unrelated disability, an employee may seek benefits up to the maximum number of available weeks permitted. Importantly, the Assessment of Public Comments to the Final Regulations highlighted that employees who have a qualifying event in 2017, such as the birth of a baby, may be entitled to leave in 2017 and again in 2018 under the new PFL.

How Benefits are Funded

PFL should not impose significant costs on New York employers, employees, or insurance carriers. The maximum employee contribution will be a modest deduction from each employee's paycheck. The Department of Financial Services (DFS) has established this employee contribution for coverage beginning January 1, 2018, to be 0.126% of an employee's weekly wage, up to and not to exceed the statewide average weekly wage. This equates to a maximum employee contribution of approximately $1.65 per week for 2018. This amount is subject to change on September 1st of each year.

Indeed, PFL is intended to be fully funded by employees, without imposing any costs on employers. During the public comment period, however, multiple inquiries were made as to whether the employee contributions will be sufficient to fully fund the PFL benefits. While it may be too soon to tell, pursuant to guidance promulgated by the DFS regarding the determination of an appropriate employee contribution rate, claims data from New York statutory disability insurers and from the New Jersey paid family leave program were considered as the starting point for establishing the contribution rate for 2018. The DFS conducted an analysis weighing varying factors, including, but not limited to, anticipated shift in claims from short-term disability to PFL, projected average claim frequency, average claim duration factors, inclusion of coverage for children born in 2017, allocation of administration expenses, and calculation of aggregate claims costs.

The Final Regulations require all insurance carriers who provide short-term disability benefits to provide PFL benefits. While it is unclear whether insurance carriers will be permitted to charge an amount in excess of the employee contributions collected by the employer to which the carrier is providing coverage, it is apparent that the ultimate goal behind PFL is for the collected employee contributions to be sufficient to pay employers' insurance premiums, and for such premiums to be equal to or greater than the total cost of PFL benefits paid by carriers to employees who utilize PFL in 2018.

Self-Insurance Options

The Final Regulations also permit employers to self-insure for PFL. These employers are still required to provide PFL benefits in the same manner as those employers who obtain insurance coverage. There are a few additional requirements, of which self-insured employers must be aware.

Initially, employers who wish to self-insure must elect to do so no later than September 30, 2017. Only those employers who currently self-insure for statutory short-term disability benefits or public employers who elect to provide PFL benefits to public employees who are not represented by an employee organization are permitted to self-insure for PFL benefits. When making this election, a self-insured employer will be required to post additional security and enter into a binding agreement accepting all liability for benefits paid that exceed funds collected from employees, provided that the contributions were at the mandatory maximum allowed by law. The Final Regulations make clear that no employee may bear any additional cost above the maximum employee contribution rate. In other words, though inconsistent with the PFL's message that it will not impose a cost upon employers, there is the potential for a self-insured employer to incur costs when administering PFL benefits that will not be recouped from employee contributions.

In addition, the Final Regulations provide that the contributions collected by self-insured employers for disability benefits and PFL benefits must be combined into a single trust fund for the purpose of making benefit payments to eligible employees. The funds cannot be commingled with other funds of the self-insured employer.

Enforcement

Employees who feel their rights under this PFL law were violated (for example, they were denied health insurance coverage while on leave), or that they have been discriminated or retaliated against for taking PFL, may file a discrimination claim at the Workers' Compensation Board under Section 120 of the Workers' Compensation Law.

What Should Employers Do Now?

Initially, employers should determine how they will obtain PFL coverage — whether they will obtain coverage through an insurance carrier or self-insure. If an employer maintains an insurance policy for short-term disability benefits, their carrier must offer PFL coverage if it continues to offer short-term disability coverage, so employers should contact their carriers as soon as possible to confirm details regarding the amount of premiums and when to begin making payroll deductions to fund the benefit without creating a surplus that might need to be returned to employees.

In addition, if employers are self-insuring short-term disability benefits, they need to either elect to self-insure PFL or obtain coverage pursuant to subdivisions one and two of section 211 of the Workers' Compensation Law. This election must made by September 30, 2017. A private employer can self-insure PFL benefits only if it is already self-insuring short-term disability benefits. Moreover, self-insurers must decide whether they will self-administer or work with a third-party administrator (TPA) to administer the benefits. While TPAs presumably will develop forms and processes to comply with the Final Regulations, self-insuring employers who are self-administering these benefits must develop forms and procedures to implement the law's provisions.

Employers also should develop a labor relations strategy for approaching the unions to obtain their agreement to permit payroll deductions, if applicable. In all likelihood, employers first will need to determine how much will be deducted and when deductions will begin. To answer those questions, employers likely will need to first determine whether they will obtain coverage through an insurance carrier or self-insure those benefits. This decision then needs to be communicated to the unions, along with how the benefit will be administered.

Employers also should review the PFL forms that will be required to be completed by employees to apply for and receive the benefits. The Board has published five forms. Employers need to determine how these forms will be integrated into their current leave-management practices. Again, this depends on whether employers will insure or self-insure this benefit and what resources will be used to administer a self-insured benefit.

Prepare for extended leave requests, especially in 2018. In preparation, consider the following:

- Employees potentially can exhaust 12 weeks of FMLA leave during 2017 but still receive another 8 weeks of PFL for the same reason during 2018.
- Many more employees are eligible for leave under PFL than are eligible for federal FMLA. There is no minimum hours worked requirement, and employees are covered after 26 weeks of consecutive employment or 175 days worked, and there is no small-worksite exception. Unlike unpaid FMLA, many more employees are likely to take PFL.
- PFL can be taken to care for a broader number of family members than federal FMLA. Therefore, an employee might be able to take 12 weeks of leave for a spouse under FMLA and additional 8-12 weeks (depending on the phase-in period) under PFL.
- Employees who ordinarily would file for short-term disability during periods of disability occasioned by childbirth now have the option of filing for PFL benefits; this will provide them a higher benefit and extend absences to 8, 10, and then 12 weeks, compared to a traditional 6-8 week disability period.
- PFL calculates the 12-month period for benefits using a rolling 12-month period measured backward from any day that leave is taken. This is the same as the FMLA rolling method. However, employers using a calendar, anniversary, or other method to calculate the 12-month FMLA period might find that leaves taken for the same reason under both laws do not always run concurrently, because leave may not be available under one of the two laws at the time leave is taken. This disparity also will make tracking leave usage and entitlement more challenging. Absence management software will have to be updated to reflect these differing standards.

In sum, employers must now determine whether and/or to what extent the PFL benefits overlap with company leave policies and/or collective bargaining agreement benefits, if any. Further, employers must ensure that a written PFL policy is adopted before January 1, 2018, and that it informs employees that overlapping leaves under FMLA or company policy will be run concurrently whenever possible. Finally, employers should begin to train HR, benefits employees, or others responsible for administering the PFL benefit on employee rights and obligations under PFL.

Please contact your Jackson Lewis attorney if you have any questions.

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