

### New York Paid Family Leave Rules Announced: Delivery Date January 1, 2018

On February 22, 2017, the New York State Workers' Compensation Board (the "Board") released proposed rules (the "Proposed Rules")<sup>1</sup> establishing the rights and responsibilities of employees, employers, and insurance carriers with respect to paid family leave under the New York Paid Family Leave Benefits Law (the "PFL"). The PFL was signed into law by Governor Andrew Cuomo on April 4, 2016 and goes into effect on January 1, 2018. (A summary of the PFL from our April 2016 Client Alert can be found [here](#)).

The Proposed Rules provide additional clarity and guidance regarding eligibility, notice requirements, payment of benefits, employer obligations, and other provisions of the PFL. The Board is accepting comments on the Proposed Rules for a 45 day period. This alert contains a summary of some notable provisions of the Proposed Rules.

#### Eligibility for Paid Family Leave

Under Workers Compensation Law ("WCL") §203, employees who work for a covered employer for 26 or more consecutive weeks will be eligible for paid family leave benefits. The Proposed Rules clarify that the 26-week rule applies to full-time employees and adds that part-time employees will be eligible for paid family leave after their 175th day of work for an employer. The eligibility criteria for paid family leave under the PFL differs from that of unpaid leave under the Family Medical Leave Act ("FMLA"), although there are situations in which the two laws will overlap. The table below summarizes eligibility categories under the PFL and the FMLA, but employers should be aware that the scope of the categories (e.g., leave provided in connection with a family member's serious health condition) may differ:

	FMLA (unpaid leave)	New York PFL (paid leave)
<b>Eligible Employers</b>	50 or more employees at or within 75 miles of worksite	All New York employers that have one or more employees for at least 30 days in a year
<b>Eligible Employees</b>	Employed for a 12 month period, having worked for at least 1,250 hours	Employed for 26 weeks (or 175 days, for part-time employees)
<b>Qualifying Events for 12 weeks of leave</b>	<ul style="list-style-type: none"> <li>- Birth, adoption, or placement in foster care of a child</li> <li>- Family member's health condition</li> <li>- Employee's own health condition</li> <li>- Family member's active military service</li> </ul>	<ul style="list-style-type: none"> <li>- Birth, adoption, or placement in foster care of a child</li> <li>- Family member's health condition</li> <li>- Family member's active military service</li> </ul> <p><u>Employee's own health condition is not a qualifying event</u></p>

If an employee is eligible for leave under both the PFL and the FMLA, the PFL allows an employer to have both leave periods run concurrently. To do so, under the Proposed Rules, an employer must provide the written notices required by the FMLA to the employee.

In addition, under the Proposed Rules, employees who are regularly scheduled to work less than 26 weeks (or 175 days,

for part-time employees) in a year must be given an option by the employer to waive their coverage under paid family leave (allowing the employee to be exempt from the obligation to contribute a portion of their pay to paid family leave). However, this waiver is automatically revoked following a change in regular work schedule which causes the employee to be eligible for paid family leave (i.e., an increase in work schedule to more than 26 weeks, or 175 days, in a year).

**Notice and Procedures for Filing Claims**

Like the FMLA, the PFL and the Proposed Rules state that employees must generally give the employer at least 30 days’ advance notice prior to the start of paid family leave if the need for leave is foreseeable, and as soon as practicable if the need for leave is not foreseeable. If paid family leave is foreseeable and the employee fails to give 30 days’ advance notice, there can be a partial denial of the paid family leave claim for a period of up to 30 days from the date the notice was provided by the employee.

The Proposed Rules also give detailed guidance on the documentation required to claim paid family leave benefits (including, as applicable, the request form, proof of eligibility/medical certifications, active duty orders, birth certificates, and adoption or placement papers). Any claim-related dispute, including over eligibility, benefit rate, and duration of paid leave arising under the PFL, is subject to administrative arbitration in accordance with WCL §221.

**Payment of Benefits under Paid Family Leave**

Under the PFL and the Proposed Rules, paid family leave benefits will be phased-in beginning January 1, 2018 under the following schedule:

<b>Year</b>	<b>Minimum Weeks of Paid Family Leave per 52 Consecutive Week Period</b>	<b>Minimum Benefits under Paid Family Leave</b>
Commencing January 1, 2018	8 weeks	At least 50% of employee’s average weekly wage*
Commencing January 1, 2019	10 weeks	At least 55% of employee’s average weekly wage*
Commencing January 1, 2020	10 weeks	At least 60% of employee’s average weekly wage*
Commencing January 1, 2021 (and onward)	12 weeks	At least 67% of employee’s average weekly wage*

\* Capped at the corresponding percentage (i.e., 50%, 55%, 60%, and 67%, respectively) of the New York State average weekly wage.

Generally, paid family leave will be funded by employee contributions to either an insurance policy from an insurance carrier or New York’s state insurance fund (similar to the way state disability benefits in New York currently operate). Employers who self-insure state disability benefits will have the option to also self-insure paid family leave (subject to the posting of additional security and execution of an agreement prescribed by the Board).

Employers are permitted to provide more generous paid family leave benefits (and can receive reimbursement from the insurance carrier or state fund for an amount up to the statutory level of benefits), but the family leave benefits provided by an employer must be no less than the statutory minimums set forth in the table above.

Under the PFL (and similar to the FMLA’s requirements), health insurance coverage must be maintained for the employee

and covered family members, but the employee must make normal contributions to the cost of health insurance premiums and must have the same rights as active employees to change coverage during open enrollment.

Finally, employers can offer employees the option to use all or part of their accrued paid vacation or other PTO during their family leave in order to receive their full salary. The PFL does not expressly permit employers to require the use of accrued paid vacation or time off during the period of paid family leave; the FMLA does permit this and the Proposed Rules do not address which rule governs when an employee is eligible for both PFL and FMLA leave.

### **Reinstatement; No Discrimination or Retaliation**

Similar to the protections afforded by the FMLA, WCL §203-b gives employees the right to be reinstated to the same or a comparable position after the conclusion of paid family leave. The PFL and the Proposed Rules also prohibit discrimination or retaliation by an employer against an employee who takes paid family leave. Generally, employees have two years to file a complaint with the Board for discriminatory or retaliatory actions by an employer under WCL §120.

### **Actions to be Taken by Employers**

Employers should take time in 2017 to design and establish their paid family leave benefits policies and procedures. Paid family leave benefits need to be provided beginning January 1, 2018, but employers can start collecting employee contributions to paid family leave as early as July 1, 2017. In addition, employee handbooks (i) must be updated to ensure that they contain a paid family leave policy (either a new policy or a modification of an existing paid leave policy) that is consistent with the requirements of the law and (ii) should also reflect the employer's choices on the various permitted policy design alternatives mentioned above.

### **Penalties for Non-Compliance**

The penalties for non-compliance can be significant – an employer may face a penalty of 0.5% of its weekly payroll during the period without coverage, plus an additional amount of up to \$500. Employers who fail to collect employee contributions (i) remain liable for payment of paid family leave benefits to employees and (ii) waive the right to collect missed employee contributions for the period of the failure. Employers who fail to continue health insurance coverage for employees on paid family leave are fully liable for all of the employee's medical costs during the period of paid family leave.

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<sup>i</sup> The text of the Proposed Rules is available at <http://www.wcb.ny.gov/PFL/pfl-regs-text.pdf>.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

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