

Paid Family Leave Regulations Delivered in Full: Now What?

On July 19, 2017, the New York State Workers' Compensation Board (the "Board") released the final rules (the "Final Rules") regarding the rights and responsibilities of employees, employers, and insurance carriers 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. As discussed in our prior Alerts, the Board released an initial set of proposed regulations on February 22, 2017 and a revised set of proposed regulations on May 24, 2017. In adopting the Final Rules, the Board largely retained the proposed regulations issued on May 24, 2017 but made several technical clarifications.

Summary of Paid Family Leave

As explained more fully in our prior Alerts, beginning January 1, 2018, the PFL provides job-protected leave to virtually all employees who work in New York State (i) to bond with a child for a period of time during the first 12 months after the child is newly born, adopted, or placed in foster care, (ii) to take care of a family member with a serious health condition, and (iii) in connection with a family member's active military service.

For 2018, eligible employees may take up to 8 weeks of paid family leave while receiving 50% of their average weekly wages, capped at the New York State average weekly wage (currently \$1,305.92 as published by the New York State Department of Labor). The maximum PFL benefits will increase in subsequent years, reaching 12 weeks of paid family leave at 67% of average weekly wages (capped at the New York State average weekly wage) beginning January 1, 2021.

Employees who work more than 20 hours per week are eligible for PFL benefits after 26 consecutive weeks of work, and employees who work less than 20 hours per week are eligible after 175 days of work. Paid family leave benefits are funded through employee payroll deductions (similar to state disability benefits) and benefits are paid out through an insurance policy obtained by the employer (or by a self-insured employer). The maximum employee payroll deduction permitted for 2018 is \$1.65 per week.

Employees generally are required to provide 30 days' advance written notice prior to taking leave for a foreseeable event, and notice as soon as practicable for an unforeseeable event. Paid family leave can be taken in a single block or on an intermittent basis. During the period of leave, health insurance coverage must be maintained for the employee and covered family members, subject to the employee paying the applicable health insurance premiums.

An employee who returns from paid family leave is entitled to reinstatement to the same or a comparable position and the Final Rules provide detailed complaint procedures for employees who believe they have been discriminated or retaliated against as a result of taking paid family leave.

Technical Revisions in the Final Rules

The Board made several technical revisions to the proposed rules relating to the calculation of PFL benefits and to other areas on which the Board received comments from the public during the last comment period. These revisions include:

- a clarification that certain jobs, like teaching positions, that have built in breaks due to the nature of the employment do not restart the period of employment for purposes of meeting the eligibility requirements for PFL benefits;
- clarifications, for employees taking leave in daily increments, in order to more accurately count time worked and average daily wages earned;

- a clarification that for part-time employees vacation time, sick time, or other paid time off will count toward days worked for purposes of determining eligibility for PFL benefits;
- a clarification that it is mandatory for an employer to provide an option to waive PFL benefits to employees who are not expected to meet the eligibility requirements for PFL benefits based on their regular work schedule (resulting in those employees not being required to contribute to PFL);
- an increase in the time that an insurance carrier (or self-insured employer) has to acknowledge receipt of a completed claim filed by an employee from one business day to three business days; and
- clarifications to the complaint process before the Board, including that an employee's formal request must be in writing and that an employer has 30 days to file an answer after receiving notice of a complaint from the Board.

Potential for Stacking and Extending Family Leave

Under the Final Rules, leave under the PFL is generally intended to run concurrent with leave under the Family Medical Leave Act ("FMLA") to the extent applicable. However, due to the interaction of the Final Rules and the FMLA rules and regulations, employers should be aware that there is potential for employees to stack and extend the different types of leave in certain situations (i.e., having different types of leave run consecutively rather than concurrently). We highlight some examples below:

- *Employee's Own Serious Health Condition.* An employee can claim a serious health condition resulting from giving birth to a child and take leave under FMLA for her own serious health condition (which would not reduce her PFL benefit entitlement) and subsequently take leave under the PFL to bond with her newborn child (so long as PFL leave starts within 12 months after birth).
- *Mismatched Measurement Periods.* If there is a mismatch between the measurement period for maximum leave benefits under the PFL (which looks back at how much PFL leave has been used on a rolling 12 month basis) and under the FMLA (which allows employers a choice of different measurement methods, including a rolling 12 month period), employees may be able to stack leave based on the same event by taking leave at the end of one FMLA measurement period and the beginning of another. This can be mitigated by an employer adopting a consistent measurement period for maximum leave benefits for both the PFL and the FMLA (i.e., by using the rolling 12 month period for both).
- *Children Born in 2017.* Even if there is no mismatch in the measurement periods used for FMLA and PFL leave, an employee who gave birth to a child in 2017 may still be able to stack leave for the child's birth by taking up to 12 weeks of unpaid FMLA leave in 2017 (before PFL benefits apply) and, beginning January 1, 2018, taking an additional 8 weeks of paid family leave under the PFL (as long as the start of PFL leave is within 12 months after birth). This situation is unique to children born in 2017 due to the commencement of the PFL rules in 2018 and should not arise in the case of children who are born in 2018 or later years (absent the mismatched measurement period situation described above).

What Should Employers Do Now?

Employers have a number of obligations under the Final Rules that require action prior to January 1, 2018. We highlight certain key required action items as well as other recommended actions below:

- In connection with implementing leave under the PFL beginning January 1, 2018, employers will need to evaluate how the minimum benefits required by the PFL should be incorporated into any existing leave policies, including paid parental leave policies and vacation/paid time off policies, among others.

- For purposes of providing the option to waive PFL benefits, employers will need to determine if any of its employees are not expected to be eligible under the PFL based on their regular work hours.
- After a PFL policy is established, employers must provide written guidance to employees regarding their rights and obligations under the PFL and information on how to file a claim for PFL benefits. If an employer maintains a written employee handbook, the information on PFL benefits must be included in the handbook.
- Employers must display or post a written PFL notice prescribed by the Board in plain view where all employees can see it (e.g., a bulletin board).
- Employers should review and become familiar with the Board's approved PFL forms and incorporate them into internal policies and procedures (in particular those forms that will be used by employees to claim PFL benefits because the employer will need to complete certain sections of those forms within a strict time frame under the Final Rules).
- Employee wage deductions for PFL benefits may (but are not required to) commence as early as July 1, 2017. Employers who expect to get coverage from an insurance carrier should discuss with their carrier and determine anticipated premium costs. This will help the employer determine the appropriate time to commence wage deductions. Employers do not need to give notice to employees before commencing wage deductions for PFL benefits.
 - Employers should try to avoid over-collecting wage deductions because amounts collected in excess of the actual cost of the PFL insurance policy must be returned to employees. However, employers should also avoid under-collecting because an employer's failure to take wage deductions may not be recovered by withholding larger than the maximum weekly employee contribution at a later date.
 - An employer may choose to pay on an employee's behalf his or her PFL contribution (in effect, paying that employee additional taxable compensation) if it desires.
- Employers who self-insure state disability benefits will need to determine whether they will obtain coverage through an insurance carrier or by self-insuring PFL benefits. These employers will need to make an election to self-insure by September 30, 2017, post the additional security, and enter into additional agreements with the Board.
- Employers who have unionized employees should approach the labor unions to potentially address PFL benefits in their collective bargaining agreements (as special rules apply to employees covered by collective bargaining agreements).

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