
March 2017

New York State Provides Guidance on Paid Family Leave Law Set to Take Effect Next Year

By Weil's Employment Litigation Practice Group

Last year, on April 4, 2016, New York Governor Andrew Cuomo signed legislation that will institute in New York one of the strongest and most comprehensive paid family leave programs in the nation. Referred to as the New York Paid Family Leave Benefits Law (“PFL”),¹ the law, which takes effect on January 1, 2018, provides for a phased-in system of up to 12 weeks of paid family leave benefits for eligible employees that will be funded through employee payroll deductions.² On February 22, 2017, the New York State Workers’ Compensation Board and Department of Financial Services proposed regulations, subject to a notice-and-comment period ending April 8, 2017, implementing the PFL. In this article, we discuss the significant features of the PFL, as clarified by the recently proposed regulations, and suggest steps employers may wish to take in anticipation of the law taking effect at the start of next year.

Employer and Employee Coverage

All private employers in New York with at least one employee on each of at least 30 days in any calendar year are “covered employers” subject to the PFL.³ Employees who have been employed by a covered employer full-time for at least 26 consecutive weeks or part-time for at least 175 days are eligible for paid family leave under the PFL.⁴ Notably, the PFL covers a broader group of employees than its federal counterpart, the Family and Medical Leave Act, which is limited to employees who have been employed for 12 months and at least 1,250 hours in the 12 month period before taking a leave of absence.⁵

Eligible employees may take a paid leave of absence under the PFL to (1) provide physical or psychological care to a family member with a serious health condition, (2) bond with a child during the first twelve months after the child’s birth, adoption, or placement with the employee in foster care, or (3) attend to a “qualifying exigency” (as interpreted under the FMLA) arising out the fact that the employee’s spouse, domestic partner, child, or parent is on active duty, or has been notified of an impending call or order to active duty, in the U.S. armed forces.⁶

Leave of Absence and Reinstatement

Ultimately, the PFL will provide employees with the right to take up to 12 weeks of family leave during any 52-week period while receiving 67% of their average weekly wages or of the state’s average weekly wage,

whichever is less. These paid family leave benefits, however, will be phased in beginning on January 1, 2018 according to the following schedule:

- On or after January 1, 2018: up to 8 weeks of paid leave in any 52-week period at 50% of the employee's average weekly wage, but not to exceed 50% of the state's average weekly wage.
- On or after January 1, 2019: up to 10 weeks of paid leave in any 52-week period at 55% of the employee's average weekly wage, but not to exceed 55% of the state's average weekly wage.
- On or after January 1, 2020: up to 10 weeks of paid leave in any 52-week period at 60% of the employee's average weekly wage, but not to exceed 60% of the state's average weekly wage.
- On or after January 1, 2021 (and for each year thereafter): up to 12 weeks of paid leave in any 52-week period at 67% of the employee's average weekly wage, but not to exceed 67% of the state's average weekly wage.⁷

Ultimately, New York's Paid Family Leave Benefits Law will provide employees with the right to take up to 12 weeks of family leave during any 52-week period while receiving 67% of their average weekly wages or of the state's average weekly wage, whichever is less.

The PFL permits the New York State Superintendent of Financial Services to delay the benefit increases at its discretion after the law takes effect based on a number of factors, including the cost of the paid leave benefit to employees, the number of insurance policies providing the paid leave benefit, and the impact of the benefit on businesses.⁸

The weekly pay for family leave after January 1, 2018 may not be less than one hundred dollars per week, except that if an employee's wages are less than one

hundred dollars per week, the employee should receive his or her full wages. Additionally, eligible employees may take paid family leave under the PFL intermittently or for less than a full work week in increments of one full day or one fifth of the weekly benefit.⁹

Any eligible employee who takes a leave of absence under the PFL is entitled, upon return from such leave, to reinstatement to the same position she or he held before the leave, or a position comparable in benefits, pay, and other terms and conditions of employment.¹⁰

Other Employee Benefits During Paid Family Leave

The PFL provides that taking paid family leave shall not result in an employee losing any other employee benefits that he or she accrued before taking leave.¹¹ The PFL further mandates that employers maintain employees' existing health benefits during paid family leave.¹² The PFL, however, does not entitle employees to accrue seniority or other employee benefits during family leave.¹³

The proposed regulations, if adopted, penalize employers who do not provide health insurance coverage to employees on paid family leave by requiring such employers to pay for employees' full medical costs while on leave.¹⁴ An employer does not have to maintain an employee's health insurance coverage if the employee is more than 30 days late in paying his or her premiums during the leave period. To discontinue an employee's health insurance coverage on that basis, however, the employer must provide at least 15 days' written notice to the employee that his or her premium payments have not been received.¹⁵

Inter action of the PFL with Other Benefits and the FMLA

The PFL provides employers with some protection with respect to the concurrence of paid family leave under the PFL and benefits that may be available under other laws or employer policies. Specifically, the PFL provides that:

- No employee may receive benefits under the PFL for more than 12 weeks during any 52-week

period, or, when combined with New York State disability benefits, more than 26 weeks during the same 52-week period.¹⁶

- An employer may offer an employee with accrued but unused “vacation or personal leave” time the option of using that time to cover the leave, in which case the employee would receive his or her full salary during the leave. Otherwise, if the employee elects not to use his or her accrued but unused vacation or personal time to cover the leave of absence, the employee will receive the percentage of his or her salary specified under the PFL.¹⁷ Contrary to the FMLA, on its face, the PFL does not allow employers to require employees to use their accrued paid leave to cover leave periods that would otherwise be covered by the PFL.
- An employee must use leave under the PFL and FMLA concurrently; an employee may not stack family leave time to exceed the maximum leave time permitted under the PFL’s phased schedule.¹⁸ Similarly, an employee may not collect benefits under the PFL concurrently with New York State disability benefits.¹⁹

Restrictions on Taking Paid Family Leave

Paid family leave under the PFL is not available:

- when the employee is receiving total disability payments pursuant to a claim for workers’ compensation, volunteer firefighters’ benefits, or volunteer ambulance workers’ benefits. However, when the employee is receiving partial payments under such laws, the paid family leave benefit, when combined with the benefits under such laws, shall not exceed the employee’s average weekly wage;²⁰
- to an employee who is not employed or is on administrative leave;²¹
- to an employee receiving sick pay or paid time off from the employer;²² or
- for any day in which the employee works at least part of the day during the same or similar working hours as those for which family leave benefits are claimed.²³

Financing of Paid Family Leave

Paid family leave under the PFL will be financed by employee payroll deductions. According to the proposed regulations, the Superintendent of Financial Services will set the maximum employee contribution amount on June 1, 2017.²⁴ On July 1, 2017, employers may, but are not required to, begin collecting the weekly contribution amounts from employees’ pay, even though employees will not become eligible to receive paid family leave until at least January 1, 2018.²⁵

Family Leave Waiver

The proposed regulations provide employees whose regular work schedules are less than 26 weeks or 175 days in a 52-consecutive week period the option of filing a waiver of paid family leave benefits.²⁶ This would exempt the employee from having to make contributions to the cost of paid family leave benefits and exempt the employer from having to provide paid family leave benefits for the employee who filed the waiver.²⁷ However, within eight weeks of any change in the regular work schedule of an employee that requires him or her to continue working for 26 weeks or 175 days in a 52-consecutive week

Under the proposed regulations, covered employers must update their employee handbooks to include information about the PFL ... Employers that do not maintain an employee handbook must provide separate written guidance.

period, any waiver that the employee previously filed will be deemed revoked and that employee must begin contributing to the cost of paid family leave benefits.²⁸

Dispute Resolution

The proposed regulations include alternative dispute resolution procedures for claims arising under

the PFL. If adopted, these procedures will require arbitration for any claim-related dispute under the PFL, including disputes concerning eligibility, benefit rate, and the duration of paid leave.²⁹ The Chair of the Workers' Compensation Board will be responsible for appointing and disqualifying arbitrators.³⁰

Arbitrators will initially seek to resolve all disputes by desk arbitration, but if, after review of the parties' submissions, the arbitrator finds it necessary to further develop the record, the arbitrator may proceed in doing so.³¹ The employer, or its insurance carrier, will be responsible for paying the arbitration fees.³²

Written Guidance and Postings

Under the proposed regulations, covered employers must update their employee handbooks to include information about the PFL, including employees' rights and obligations under the law and information about how to file a claim for paid family leave.³³ Covered employers that do not maintain an employee handbook must provide separate written guidance on the PFL to employees.³⁴

Covered employers also must post notice about the PFL in a form authorized by the Chair of the Workers' Compensation Board in plain view where all employees and applicants can readily see it.³⁵

Requesting Leave Under the PFL

When the need to take a leave of absence is foreseeable (such as in the case of the birth or adoption of a child), the employee must provide the employer with at least 30 days' notice of the intent to take leave before the leave begins. If the need to take leave is not foreseeable, the employee must provide as much notice as practicable to the employer.³⁶

The proposed regulations contemplate that the Chair of the Workers' Compensation Board will create a Request for Paid Family Leave form (currently the form PFL-1) for employees to use to claim paid family leave under the PFL. An employer may designate an alternative means for employees to request leave paid family leave under the PFL (including via an electronic portal or telephone), but still must accept the PFL-1 form, if submitted by an employee.³⁷

Practice Pointers for Employers

New York employers should use the lead time before the PFL becomes effective on January 1, 2018 to prepare for implementation of the new law. Some steps that employers may wish to take to prepare include:

- Reviewing current leave policies and preparing written guidance, including revising employee handbooks, regarding employees' rights and obligations under the PFL. Employers who are not covered by the FMLA should not assume that they are not covered by the PFL, given that the PFL makes paid family leave available to employees regardless of the number of employees a business employs.
- Analyzing its workforce to determine whether employees who were not eligible for benefits under the FMLA are eligible for paid family leave under the PFL. The FMLA requires covered employers to provide benefits for individuals employed for 12 months and who had worked at least 1,250 hours within the previous 12 months. The threshold is lower under the PFL, with full-time employees becoming eligible for paid family leave after 26 weeks of full-time work or 175 days of part-time work.
- Preparing displays or postings in accordance with the proposed regulations, accounting for employees who may not read English or who are sensory-impaired.
- Ensuring appropriate processes are in place for deducting contributions from employees' pay. Employers may commence such deductions as soon as July 1, 2017, if the proposed regulations are adopted.
- Determining whether to offer another format for employees to request paid family leave, aside from submitting the form prescribed by the State.

-
1. See New York State Budget, S. 6406-C, A. 9006-C (Apr. 4, 2016) at Part SS.
 2. See N.Y. W. Comp. L. § 209.
 3. N.Y. W. Comp. L. § 202.
 4. 12 NYCRR §380.2-5.

Employer Update

5. 29 U.S.C. §2611(2)(A).
6. N.Y. W. Comp. L. § 201(15).
7. *Id.* § 204(2)(A).
8. *Id.*
9. *Id.*
10. *Id.* § 203(B).
11. *Id.*
12. *Id.* § 203(C).
13. *Id.* § 203(B).
14. 12 NYCRR §380.7-10(d).
15. 12 NYCRR §380.7-4(d).
16. N.Y. W. Comp. L. § 205(2)(A).
17. *Id.* § 205(2)(C).
18. *Id.*
19. *Id.* § 205(4); 12 NYCRR §380.2-5(e)-(f).
20. *Id.* § 206(3)(a).
21. *Id.* § 206(3)(b).
22. *Id.* § 206(3)(c).
23. *Id.* § 206(3)(d).
24. *Id.* § 209(3)(b).
25. 12 NYCRR §380.2-4(d).
26. *Id.* §380.2-6(a).
27. *Id.*
28. *Id.* §380.2-6(b).
29. *Id.* §380.9-1.
30. *Id.* §380.9-2.
31. *Id.* §380.9-8.
32. *Id.* §380.9-5.
33. *Id.* at §380-7.2(a)(1), (a)(2).
34. *Id.* at §380.7-2(a)(2).
35. *Id.* §380-7.2(e).
36. N.Y. W. Comp. L. § 205(4).
37. *Id.* §380-5.1.

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Practice Group Members:

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

London
Joanne Etherton
+44 20 7903 1307
joanne.etherton@weil.com

Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

© 2017 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please [click here](#). If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.