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Resource Guide:

What Employers Need to Know About New York's Impending Paid Family Leave Benefits Law and Final Regulations

On July 19, 2017, the New York State Workers' Compensation Board ("WCB") issued its final regulations ("Regulations") for the New York Paid Family Leave Benefits Law ("PFLBL" or "Law"), which, effective January 1, 2018, will provide most New York-based employees with paid family leave benefits.[1] On the same day that these Regulations were published, the WCB also issued an Assessment of Public Comment ("Assessment"), which addresses certain public comments to the prior iteration of the Regulations.[2]

New York State has also published two fact sheets—one for employees and one for employers—outlining the basic elements of the PFLBL. And finally, the New York State Department of Taxation and Finance issued guidance regarding certain tax implications of the PFLBL.

The following summarizes what New York employers need to know about the PFLBL.

A. Summary of Benefits

When fully implemented, New York's PFLBL will provide up to 12 weeks of PFL during a 52-consecutive week period to employees for the following purposes:

- to participate in providing care, including physical or psychological care, for a family member of the employee made necessary by a serious health condition[3] of the family member;[4]

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[1] The WCB first published regulations to the PFLBL in February 2017, and then updated those regulations in May. A review of the changes between the earlier regulations and the final regulations may be found in the blog post titled "New York Paid Family Leave Regulations Finalized: How Do They Compare to Prior Versions?" (hereinafter "Blog Post").

[2] See the Blog Post for an analysis of how the Regulations and Assessment modified the WCB's prior interpretation of certain aspects of the PFLBL.

[3] The definition of a "serious health condition" is the same as under the federal Family and Medical Leave Act ("FMLA").

- to bond with the employee's child[5] during the first 12 months after the child's birth, or the first 12 months after the placement of the child for adoption or foster care with the employee; or

- because of any qualifying exigency, as interpreted under the federal Family and Medical Leave Act ("FMLA"), arising out of the fact that the spouse, domestic partner, child, or parent of the employee is deployed abroad on active duty in the U.S. Armed Forces (or has been notified of an impending call or order to active duty abroad).

Unlike New York's disability benefits, there will be no waiting period before employees become eligible to receive PFL benefits; benefits will be payable immediately upon the outset of the leave.

The length of available leave benefits and amount of weekly benefits will increase yearly, on the following schedule:

Date	Length of Benefits Within a 52-Week Period	Amount of Benefit Payments
January 1, 2018	Up to 8 weeks	50% of average weekly wage, not to exceed 50% of the state average weekly wage (currently $652.50 per week)
January 1, 2019	Up to 10 weeks	55% of average weekly wage, not to exceed 55% of the state average weekly wage (TBD)
January 1, 2020	Up to 10 weeks	60% of average weekly wage, not to exceed 60% of the state average weekly wage (TBD)
January 1, 2021	Up to 12 weeks	67% of average weekly wage, not to exceed 67% of the state average weekly wage (TBD)

The carrier (or employer if self-insured) may provide PFL benefits via debit card or direct deposit or by check.

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[4] A "family member" means a child, parent (including parent-in-law), grandparent, grandchild, spouse, or domestic partner, as these terms are defined in the New York State Workers' Compensation Law. Note that this is a broader definition than under the federal FMLA.

[5] A "child" means biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or the person to whom the employee stands *in loco parentis*.

B. Employee Eligibility

Employees[6] become eligible for PFL benefits upon working either of the following:

- 26 consecutive weeks (for employees whose regular employment schedule is 20 or more hours per week) or

- 175 days (for employees whose regular employment schedule is less than 20 hours per week).[7]

Any time off otherwise provided by an employer, where the employee is away from work but is still considered to be an employee by the employer (including paid vacation, personal days, sick leave, holidays, or other approved time away from work), counts toward the employee's consecutive workweeks for purposes of determining eligibility for PFL, provided that, during the period of time off, the employer continues to make the required payroll contributions for that particular employee. However, periods of temporary disability during which an employee receives disability benefits under the Workers' Compensation Law are *not* counted toward weeks or days worked for determining PFLBL eligibility.

Additionally, for positions in which breaks in service are inherent, such as professors who have semester breaks, such periods of absence are not counted against the employee in determining whether the 26-consecutive week service period requirement is satisfied (but those break periods are not counted as time worked).

The PFLBL applies only to employees who work in New York State. Employees who primarily work outside of New York State, but only "incidentally" work in New York, are *not* covered by the Law. The term "incidentally" is not defined in the Law, Regulations, or Assessment.

C. Employee Contributions

The New York State Department of Financial Services released its determination that the rate of contribution for PFL will be 0.126 percent of an employee's weekly wage, up to a maximum of $1.65 per week (0.126 percent of the statewide average weekly wage, currently $1,305).

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[6] Certain categories are excepted from the definition of "employee," including independent contractors and livery drivers covered for work-related injuries by the Independent Livery Disability Benefits Fund and black car operators covered by the Black Car Operator's Fund.

[7] The "Family leave waiver" section of the PFLBL states that waivers are permissible if an employee whose schedule is less than 20 hours per week will not work at least 175 days in a 52-week period. However, the "Eligibility" section of the Law is not clear as to whether this 175-day requirement must be satisfied within a 52-weeek period.

Although the PFLBL becomes effective on January 1, 2018, employers have been permitted (but not required) to make PFLBL payroll deductions since July 1, 2017.

It is not clear whether, as of January 1, 2018, an employer may opt to make contributions on its employees' behalf, or, alternatively, if the employer will be required to deduct from employees' paychecks to fund its insurance policy. Further, while the Law does not require employers to provide notification to employees that deductions will begin, as noted below, it is generally a best practice to notify employees prior to making any deductions from their wages.

Employers must use all contributions to either purchase a PFL policy from an insurance carrier or to self-fund a policy. All surplus contributions that exceed the actual cost of the annual premium for the PFL policy must be promptly returned to employees.

D. Calculating Leave

Eligibility

The 52-consecutive-week period referenced above is measured on a "rolling backward" basis. In other words, the amount of leave available to an employee is measured by reviewing how much PFL or New York State short-term disability benefits[8] the employee has taken in the previous 52 weeks, as of the first date that PFL benefits would begin. This is consistent with one of the most common methods of calculating leave under the federal FMLA.

If employers instead use a "rolling forward" or "calendar year" method for calculating FMLA eligibility, this may pose administrative difficulties in managing leave eligibility under both the FMLA and PFLBL. Therefore, New York employers that do not currently use the "rolling backward" method of calculating FMLA leave may wish to consider adopting that method at this time.[9] If employers do elect to change methods of calculating eligibility, certain notice requirements under the FMLA will apply.

Intermittent Leave

Employees who work at least five days per week may take up to 60 days of PFL per year (once the benefit is fully effective—i.e., 12 weeks of leave is available). For

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[8] As noted below, an employee may only receive a combined total of 26 weeks of disability benefits and PFL benefits in a 52-consecutive-week period.

[9] Note that under the FMLA, leave eligibility must be calculated on a "rolling forward" basis for "Servicemember Family Leave" (sometimes known as "military caregiver leave"). While there is no detailed provision under the PFLBL addressing Servicemember Family Leave in particular, there are references to military caregiver leave in the PFLBL. As such, if the family member for whom an employee wishes to take PFL happens to be a servicemember, employers should be aware that FMLA eligibility and PFL eligibility may be determined differently (i.e., one is determined on a "rolling forward" basis, while the other is determined on a "rolling backward" basis).

employees who work fewer than five days per week, the maximum number of days available is prorated based on their regular employment schedule. Further, when an employee takes intermittent PFL, the employer may require the employee to provide notice as soon as is practical before each day of the intermittent PFL.

When an employee is taking PFL in daily increments (rather than weekly increments), the employee's daily rate of pay will be calculated using an eight-week look-back period to calculate the average weekly wage. Any week partially worked during that period as a result of taking PFL should not count against the employee in determining the average weekly wage.

E. Waiver of PFL

Employers must provide employees who are not eligible for PFL (i.e., those employees who, in connection with their regular work schedules, never achieve 26 consecutive weeks or 175 days in a 52-consecuitive-week-period) with the option to file a waiver of PFL benefits. This waiver would exempt an employee from the obligation to have PFL payroll contributions withheld from his or her wages.

Any waiver will be deemed automatically revoked within eight weeks following any change in the employee's regular work schedule that is expected to yield (i) at least 26 consecutive weeks (where the regular employment schedule is 20 hours or more per week) or (ii) 175 days in a 52-consecutive-week period (where the regular employment schedule is less than 20 hours per week). At that time, payroll contributions should begin (including retroactive amounts due from the date of hire), and once the employee reaches the eligibility threshold, the employee will become eligible to receive PFL benefits. Any waiver must be voluntarily provided by the employee; an employer cannot mandate or influence the employee's decision to complete a waiver.

Importantly, it appears that ineligibility for PFL is the only basis for a waiver. In other words, employees *may not* opt out of coverage simply because they wish to avoid the related payroll deductions.

F. Employee Requirements for Obtaining Leave

Requesting Leave

When the leave is foreseeable, employees must provide at least 30 days' notice, and when the leave is unforeseeable, notice must be provided as soon as practicable under the facts and circumstances surrounding the need for the leave. In addition to any leave request requirements established by employer policy, employees may apply for leave using the "Request for Paid Family Leave and Certification" form (to be created by New York State) and submitting it to either the insurance carrier or, if the employer is self-insured, to the employer. Employees must generally receive payment (or notice of denial of benefits) within 18 days of submitting the request.

Certification

In order to complete a request for PFL, employees must submit one of the following to the insurance carrier (or self-insured employer):[10]

- a certification from a health care provider treating the family member;
- documentation regarding the placement of a child for adoption or foster care; or
- for military exigency leave:
    - a copy of the military member's active duty order or other documentation issued by the military that indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service; and
    - additional information describing and supporting the need for the exigency leave (such as supporting facts and dates).

G. Employer Requirements

All New York employers will be required to maintain insurance coverage under the PFLBL similar to the requirements surrounding short-term disability benefits and workers' compensation.

If an employee handbook contains information about employee benefits or leave rights, employers *must* provide information in the handbook concerning leave and employee obligations under the PFLBL.[11] If there is no written policy, the employer must provide written guidance to each employee regarding his or her rights and obligations under the PFLBL, including information on how to file a PFL claim.

An employer that fails to provide coverage may be subject to a penalty of 0.5 percent of the employer's total weekly payroll for the period without coverage, plus a fine of up to $500. Further, employers that (i) fail to collect contributions and (ii) fail to provide coverage by purchase of an insurance policy or self-insuring will be fully liable for the payment of PFL benefits, and they waive the right to collect applicable employee contributions for the period during which no coverage was provided.

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[10] The Regulations list an extensive set of documents that may be considered proof of eligibility to support various reasons for PFL.

[11] The date by which handbooks must be amended has not been made clear. In any event, even if an employer does not amend handbooks until January 1, 2018, it will likely want to inform employees about deductions, eligibility for a waiver, and the PFL benefits to which employees will be entitled, prior to the time that deductions will be made from pay.

Employers must also post a PFL notice of rights in a location where it can be readily seen by all employees and/or applicants. This poster will be prepared and made available by New York State.[12]

H. Interaction with Other Laws and Benefits

Interaction Between (i) Leave and Benefits Utilized in 2017 and (ii) Qualifying Leave and Benefits in 2018

The fact that an employee took leave due to the birth of a child or the placement of a child with the employee for adoption or foster care in 2017 will *not* impact that same employee's eligibility to do so in 2018 under the PFLBL. In other words, so long as the qualifying event (i.e., birth or placement for adoption or foster care of the employee's child) occurred within the 12-month period prior to the outset of a requested leave, an employee who took leave to bond with his or her child in 2017 (under any applicable law or employer policy) will still be eligible for up to the full allotment of eight weeks of PFL in 2018, notwithstanding the leave already taken. This is true even if the employee exhausted all relevant leave under any applicable law or employer policy in connection with the 2017 leave.

Disability Benefits

Employees may not receive both disability benefits and PFL benefits for the same period of time. Further, employees may only receive a combined total of 26 weeks of disability benefits and PFL benefits in a 52-consecutive-week period.

FMLA

If an employer concurrently designates a period of PFL as FMLA leave, the employer must notify the employee of such designation (in accordance with the methods provided in the PFLBL and FMLA). If such notification does not occur, the employer will be deemed to have permitted the employee to receive PFL benefits without concurrently utilizing his or her allocation of FMLA leave. Further, if an employee is eligible for leave under both the federal FMLA and the PFLBL, but the employee declines to apply for PFL payments under the law, employers may still designate the leave as both FMLA and PFL leave.

Keep in mind, however, that FMLA-designated leave taken by an employee due to his or her own serious health condition does not qualify as family leave under the PFLBL, and does not reduce the amount of PFL that the employee is eligible to take. For example, a pregnant employee who experiences 12 weeks of pregnancy- or childbirth-related disability that is covered by the FMLA (and not by the PFLBL) may then take the

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[12] No guidance has been provided as of this date as to what employers must do to ensure that applicants for employment can see such notice.

full allotment of PFL (eight weeks in 2018) for baby bonding purposes after the period of disability ends, for a total period of 20 weeks of protected leave.

An employer covered by the FMLA that designates a concurrent period of PFL may charge an employee's accrued paid time off ("PTO") in accordance with the provisions of the FMLA. However, as explained in greater detail below, employers may *not* require that an employee use accrued sick, personal, or vacation time when the employee is otherwise receiving pay during PFL. An employee may, however, *elect* to use accrued sick, personal, or vacation time to receive his or her full salary (as opposed to the level of pay provided under the PFLBL).

While partially worked days do not generally count as leave taken under the PFLBL, employers may elect to track hours as taken for FMLA leave during such days. When the total hours taken for FMLA leave in less-than-full-day increments reaches the number of hours in an employee's usual work day, the employer may deduct one day from the employee's annual PFL benefit allotment.

Employer-Provided Benefits

As mentioned above, during any period when an employee is receiving PFL benefits, the employer may permit the employee to choose whether he or she will use accrued, unused PTO benefits (such as vacation, sick, or personal days) to bring his or her salary up to the full salary level while on leave. But, employers may *not* require that employees use such accrued, unused PTO benefits while receiving PFL benefits.

If an employee chooses to use such PTO benefits, an employer may seek reimbursement for any PFL benefits received by the employee during that period.[13] It is our understanding that this also includes any parental leave policy during which an employee would receive full pay.

Health Benefits

While an employee is receiving PFL benefits, employers will be required to maintain any existing health benefits on behalf of the employee.[14]

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[13] The Regulations state the following:

> In the event an employer offers, and the eligible employee exercises, an option to charge all or part of his or her family leave time to unused accruals or other paid time off and receive full salary, the employer may request reimbursement out of any family leave benefits due or to become due by filing its claim for reimbursement with the carrier prior to the carrier's payment of such family leave benefits. The actual reimbursement amount may be computed after family leave is complete.

[14] The employee may be required to continue any employee contributions toward the continuation of such coverage in the same manner as under the federal FMLA.

I. Other Notable Provisions

Reinstatement and Non-Discrimination/Non-Retaliation Rights

Employers may not discriminate or retaliate against an employee because he or she filed for or received PFL benefits. Further, employers will be required to reinstate an employee to the position that he or she held when leave commenced, or to place the employee in a comparable position with comparable benefits, pay, and other terms and conditions of employment. If an employee is laid off during a period when he or she is receiving PFL benefits, the employer must be able to demonstrate that the layoff is not in retaliation for filing a claim for PFL benefits.

Collective Bargaining Agreements

Employers that have employees or classes of employees subject to a collective bargaining agreement ("CBA") are not required to supply such employees with PFL coverage when the collective bargaining agreement:

- provides paid family leave benefits at least as favorable as provided under the Law, *and*

- does not permit an eligible employee to waive his or her rights to paid family leave or otherwise opt out of the law, except as otherwise permitted for employees who will not become eligible for PFL.

Except as noted above, a CBA may provide rules related to PFL that differ from the PFL's requirements. Where a CBA does not provide a different rule, the PFLBL and its Regulations will govern.

Tax Treatment

According to the New York State Department of Taxation and Finance:

- benefits paid to employees will be taxable non-wage income that must be included in federal gross income;

- taxes will not automatically be withheld from benefits, but employees can request voluntary tax withholding;

- premiums will be deducted from employees' after-tax wages;

- employers should report employee contributions on IRS Form W-2 using Box 14 – State disability insurance taxes withheld; and

- benefits should be reported by the State Insurance Fund on Form 1099-G and by all other payers on Form 1099-MISC.

Domestic Violence

The PFLBL addresses domestic violence in two notable ways. First, a carrier or self-insured employer may deny a claim of a perpetrator of domestic violence or child abuse against the care recipient for whom the perpetrator-employee is seeking to take PFL. Second, a health care provider may refuse to supply a certification for PFL when the employee requesting the leave is the perpetrator of domestic violence or child abuse against the care recipient.

Arbitration of PFL-Related Claims

An arbitration procedure has been established for all claims related to PFL, including eligibility, benefit rate, and the duration of paid leave. The arbitration procedure will be governed by the Workers' Compensation Law.

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ACT NOW ADVISORY

Employer Resource Guide to the New York State Paid Family Leave Benefits Law

September 8, 2017

By Susan Gross Sholinsky, Marc A. Mandelman, Dean L. Silverberg, and Nancy L. Gunzenhauser

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On July 19, 2017, the New York State Workers' Compensation Board ("WCB" or the "Board") issued its final regulations ("Regulations") for the New York Paid Family Leave Benefits Law ("PFLBL" or "Law"), which, effective January 1, 2018, will provide most New York-based employees with paid family leave benefits. On the same day that these Regulations were published, the WCB also issued an Assessment of Public Comment ("Assessment"), which addresses certain public comments to the prior iteration of the Regulations. Please see our blog post for an analysis of how the Regulations and Assessment modified the Board's prior interpretation of certain aspects of the PFLBL.

When the PFLBL becomes effective, most employees working in New York State will be eligible for paid family leave ("PFL") benefits. Employers are not responsible for actually providing pay to employees during a period of PFL; rather, employees will receive PFLBL benefits through an insurance policy that will either be purchased by the employer from an insurance company or self-funded by the employer.

New York State has also published two fact sheets—one for employees and one for employers—outlining the basic elements of the PFLBL. In addition, on August 29, 2017, the New York State Department of Taxation and Finance issued guidance regarding certain tax implications of the PFLBL.

We have created **a handy resource guide** that provides the latest updates on the PFLBL, includes links to where additional information about the PFLBL can be found, and summarizes what employers need to know about the Law.

What New York Employers Should Do Now

In anticipation of the January 1, 2018, effective date of the PFLBL, New York employers should take the following actions:

- Revise leave of absence policies addressing leaves covered by the PFLBL (i.e., all leaves covered by the federal Family and Medical Leave Act, except leaves for an employee's own serious health condition) to provide cross-references to, and/or information regarding, the PFLBL. The policies should include information pertaining to employees' right to leave and benefits, as well as information on filling a claim for PFL benefits.

- In the absence of an employee handbook or other written policies, prepare written guidance to provide to employees concerning their rights under the PFLBL and information on how to file a claim for PFL.

- Consider how the PFLBL will interact with any PFL or paid parental leave currently provided pursuant to company policy.

- Determine whether to provide the benefit level required under the PFLBL through the applicable insurance policy or, alternatively, to allow employees to receive full pay during all or part of a period of PFLBL coverage.

- Consider whether to self-insure or obtain PFL coverage through an insurance carrier.[1]

- Prepare to obtain coverage, either through an insurance carrier or as a self-insured employer, under the PFLBL.

- Prepare to begin payroll deductions with your payroll service provider—such deductions may begin any time after July 1, 2017.

- Consider whether and, if so, how to notify your employees prior to implementing deductions for PFL benefits. Although such notification is not required under the PFLBL, we recommend that employers do so.

- Determine which employees may qualify for a waiver of PFLBL deductions and notify those employees of their right to waive participation.

- Review any collective bargaining agreements covering employees working in New York State to assess what impact, if any, the PFLBL may have on contractual obligations, and consider whether you must address PFLBL-related terms in future contract negotiations.

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[1] Employers are not responsible for actually providing pay to employees during a period of PFL, since the paid leave will be funded by an insurance policy, and the premium of the policy is funded by employee payroll contributions.

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Retail Labor and Employment Law

News, Updates, and Insights for Retail Employers

New York Paid Family Leave Regulations Finalized: How Do They Compare to Prior Versions?

By Susan Gross Sholinsky, Marc A. Mandelman & Nancy L. Gunzenhauser on September 8, 2017

POSTED IN ANNOUNCEMENTS, EMPLOYEE BENEFITS, EMPLOYMENT TRAINING, PRACTICES AND PROCEDURES

On July 19, 2017, the New York State Workers' Compensation Board ("WCB" or the "Board") issued its **final regulations** ("Final Regulations") for the New York State Paid Family Leave Benefits Law ("PFLBL" or the "Law"). The WCB first published regulations to the PFLBL in February 2017, and then updated those regulations in May (collectively, the "Prior Regulations").

While the Final Regulations did clarify some outstanding questions, many questions remain, particularly pertaining to the practical logistics of implementing the Law, such as the tax treatment of deductions and benefits, paystub requirements, certain differences between requirements that pertain to self-funding employers and those employers intending to obtain an insurance policy, and what forms and procedures will apply.

As we **previously reported**, when the PFLBL becomes effective on January 1, 2018, most employees working in New York State will be eligible for paid family leave ("PFL") benefits. Employers are not responsible for actually providing pay to employees during a period of PFL; rather, employee payroll deductions will fund an insurance policy, which will either be managed by a third party or self-funded by the employer, from which employees will receive PFLBL benefits.

On the same day the Final Regulations were published, the WCB also issued an **Assessment of Public Comment** (the "Assessment"), which addresses certain public comments to the Prior Regulations. The State has also published two fact sheets – one for **employees** and one for **employers** – outlining the basic elements of the PFLBL.

The following summary addresses the updates in the Final Regulations, as compared to the Prior Regulations, as well as some additional insight from the Assessment.

Collective Bargaining Agreements. The Final Regulations clarified that employers that have employees or classes of employees subject to a collective bargaining agreement ("CBA") are not required to supply such employees with PFL coverage in accordance with the terms of the Law, but only so long as the CBA:

1. provides paid family leave benefits at least as favorable as those provided in the Law; and
2. does not include a provision whereby otherwise-eligible employees may waive their rights to paid family leave or otherwise opt-out of the law (except in accordance with the opt-out provisions in the Law for employees who will not become eligible for PFL).

The Final Regulations specify that, except as noted above, a CBA may, indeed, contain paid family leave provisions that differ from the requirements in the Final Regulations. Where a CBA does not provide a different rule, however, the Final Regulations and the Law will govern.

Employee Contributions. The WCB declined to amend the Final Regulations with respect to whether employers must begin employee payroll deductions prior to January 1, 2018. In the Assessment, the Board confirmed that deductions under the Law were permitted to begin on July 1, 2017, but there is no requirement to make deductions prior to January 1, 2018; thus, in 2017, payroll deductions for employee contributions is a permissive choice that employers may make.

Further, the Assessment noted that the Law does not require notification that deductions will begin; however, it is generally best practice to notify employees prior to deducting from employees' wages. Neither the Assessment nor the Final Regulations address whether as of January 1, 2018, an employer may opt to pay the contributions on its employees' behalf, or

whether alternatively, employers must deduct from employee's paychecks for this contribution.

Interaction Between Qualifying Leave and Benefits in 2017 and 2018. The Board received a comment asking whether an employee who took leave to bond with his or her child in 2017 will still be eligible for up to the full 8 weeks of PFL in 2018, notwithstanding the leave already taken. The Board stated in the Assessment that employees will, indeed, be eligible for up to 8 additional weeks of leave in 2018 under NYPFLBL, even if the employee exhausted all applicable leave under federal law and the employer's policies in 2017.

The Law limits the use of PFL and New York State short-term disability benefits ("STD") in a 52-week period to a total of 26 weeks, which essentially reduces an employee's eligible for STD based on the amount of PFL used. On the positive side, the Assessment noted that in 2018, the 52-week lookback period includes leave taken in 2017. Thus, an employee who has utilized STD in 2017 will have his or her 26-week allocation during the applicable 52-week period reduced by any STD utilized during 2017 (so long as it was used within the applicable 52-week look-back period).

Waivers of PFL. The Final Regulations revised employers' requirements to offer a waiver from PFL deductions from permissive to mandatory. The language previously stated that employees who do not meet the PFLBL eligibility requirements "may" be provided the option for a waiver – the "may" has been changed to "shall." The Assessment clarified that it is the employee's choice of whether to complete a waiver, not the employer's.

Coverage Outside New York. The Assessment confirmed that the PFLBL applies to employees who work in New York State. If an employee works outside of New York State, and only "incidentally" works in New York, those employees are not covered by the Law.**[1]**

Calculation of Daily Benefits. The Final Regulations amended the calculation of benefits when an employee is taking PFL in daily increments (rather than weekly increments). Under the Prior Regulations, if an employee worked a partial week prior to beginning PFL, then, in calculating the level of benefits to which the employee would be eligible for the day(s) off based on the eight weeks prior to taking leave, the employee's weekly rate could be reduced by the day(s) the employee did not work in that final week. For example, the 8 week period could include a partial week of work, thus reducing the employee's average wages. The Final

Regulations use the same 8-week period as calculating an average weekly wage, which will exclude the final partial week of leave.

Positions with Breaks in Service – Impact on Eligibility. The Final Regulations added a paragraph to the "Eligibility" section, so as to clarify how to calculate consecutive weeks of service for positions that inherently contemplate breaks in service, such as professors who have semester breaks. For such positions, the 26-consecutive week period requirement may be tolled during periods of absence that are due to the nature of that employment. In other words, with respect to such individuals' employment, the breaks in service would not be considered weeks worked when considering whether the individual had worked at least 26 weeks in the prior 52-week period (for eligibility purposes), but also would not re-start the period of employment to determine eligibility under the Law.

Returning Surplus Contributions. The Board received two comments seeking clarification regarding the requirement to return surplus contributions. The Final Regulations provide that employers shall use the employee contributions to provide PFL benefits, which "means to pay for a policy or self-insure." The Assessment states that employers are required to return to employees any "surplus amount withheld that exceeds the actual cost" of the annual premium of the PFL policy. No changes were made to the Final Regulations.

Interaction with New York City Earned Sick Time Act ("ESTA"). The Assessment confirms the language in the Prior Regulations that employees may elect to use paid time off (such as vacation, personal days, or sick time) to receive full salary during PFL, but that it is not mandatory. As the PFLBL does not cover an employee's own illness, PFL would only run concurrently with sick leave under ESTA for purposes of caring for an employee's family member.

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[1] While the Law, Final Regulations, and Assessment do not define "incidentally," the New York State PFLBL website indicates that employees must work 30 or more days in a calendar year New York to be covered.

Retail Labor and Employment Law