

## New York Issues Updated Regulations to Paid Family Leave Benefits Law

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On May 24, 2017, the New York State Workers' Compensation Board ("WCB") published updated [regulations](#) ("Updated Regulations") to the New York Paid Family Leave Benefits Law ("PFLBL"), which, as we previously [reported](#), becomes effective on January 1, 2018. The Updated Regulations incorporated 117 formal written comments to the February 22, 2017, [proposed regulations](#) issued by the WCB ("Proposed Regulations"). Comments to the Updated Regulations will be accepted through June 23, 2017.

When fully implemented, New York's PFLBL will provide up to 12 weeks of paid family leave ("PFL") during a 52-week calendar period for employees who seek to:

- care for a family member with a serious health condition,
- bond with their newborn or newly placed adoptive or foster child, or
- address certain exigencies arising when a family member is called to active military service.

The Updated Regulations amend the Proposed Regulations, providing definitions and [explanations](#) for many of the key provisions of the PFLBL, including eligibility, notice requirements, and various employer obligations. In addition, the Updated Regulations provide several significant clarifications to the existing Proposed Regulations. These amendments and clarifications relate to the following:

- **Full-Time and Part-Time Employment.** The Proposed Regulations defined "full-time employees" who are eligible for PFL as those who have worked for the employer for at least 26 consecutive workweeks, and "part-time employees" who are eligible for such benefits as those who have worked for at least 175 days, and broadly stated that "part-time" employees work fewer than five days per week.

While the Updated Regulations remove the terms “full-time employee” and “part-time employee,” they otherwise maintain the concepts. Employees become eligible for the PFLBL upon working either:

- 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).<sup>1</sup>
- **The Optional Waiver.** The Updated Regulations clarify that the optional waiver, whereby employees may elect to not provide weekly contributions, is available for an employee whose regular work schedule never achieves 26 weeks or 175 days in a 52-consecutive-week period.
  - **Intermittent Leave.** If an employee takes intermittent PFL in daily increments, employees who work at least five days per week may take up to 60 days<sup>2</sup> of PFL per year. For 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 practicable before each day of the intermittent PFL.

- **Interaction with the Family and Medical Leave Act (“FMLA”).**
  - The Updated Regulations clarify that 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.
  - 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 may take up to 12 weeks of leave for her own serious health condition that is covered by the FMLA (and not by the PFLBL), and then take PFL after the period of disability ends so that she may bond with her child.

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<sup>1</sup> With respect to employees who work fewer than 20 hours per week, the newly revised eligibility section of the Updated Regulations does not establish a time period during which employees must work 175 days. In contrast, the section of the Updated Regulations for the optional waiver of contributions indicates that employees who work fewer than 20 hours per week may waive contributions because they will not become eligible for PFL if such employees will not work at least 175 days in a 52-consecutive-week period.

<sup>2</sup> Employees will be eligible for a maximum of 60 days as of January 1, 2021, when PFL benefits reach their maximum of 12 weeks.

- An employer covered by the FMLA that designates a concurrent period of PFL may charge an employee's accrued paid time off in accordance with the provisions of the FMLA. Employers may not require that employees use accrued sick, personal, or vacation time when the employee is otherwise receiving pay during PFL; however, an employee may elect to use accrued sick, personal, or vacation time to "gross up" his or her salary during PFL.
- **The Definition of "Employee" Under the PFLBL.** The Updated Regulations exclude several new categories from the definition of "employee," including 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.
- **The PFLBL's Interaction with Collective Bargaining Agreements ("CBAs").** In light of several comments about unionized workforces, the WCB provided more detail regarding collectively bargained benefits. The Proposed Regulations stated that, subject to prior approval, CBAs could provide rules related to PFL that differ from the regulations. The Updated Regulations clarify that such rules in a CBA may include (but are not limited to):
  - that employees are permitted to collectively establish their eligibility for PFL benefits through actual time worked at any employer covered by the CBA, so long as the time period for eligibility is not greater than as required by section 203 of the Workers' Compensation Law, and
  - that the union may be responsible for all time records and payroll deductions related to the administration of the PFLBL.
- **Claims.** The Updated Regulations make slight changes with respect to the timing of a denial of leave. Further, while the Updated Regulations continue to permit payroll debit cards and direct deposit as methods of payment for PFL benefits, the Updated Regulations remove the specific rules for payroll debit cards, likely in light of the [pending litigation](#) regarding New York State's direct deposit and payroll debit card regulations.
- **Employee Location Requirements.** The Updated Regulations remove the language that specified that work performed outside the state of New York will count as time worked for the purpose of PFL eligibility. However, the Workers' Compensation Law already provides that such work is, indeed, counted for eligibility purposes.
- **Penalties.** Since the penalties for violating the PFLBL are already listed in the statute, the WCB removed this section in the Updated Regulations.
- **Reinstatement.** The Proposed Regulations provided that when a covered employer declines to reinstate an eligible employee after a period of PFL, the

employee would have 120 days from the violation to file a complaint. The Updated Regulations still allow the employee to file the complaint, but they have removed the 120-day time period and now impose no time limit for such a complaint. The Workers' Compensation Law provides a two-year statute of limitation for claims of discrimination or retaliation under the PFLBL.

- **Employee Contributions.**

- Many comments to the Proposed Regulations were about the timing of employee contributions. Although the PFLBL becomes effective on January 1, 2018, the Proposed Regulations permitted employers to begin the payroll deductions on July 1, 2017. The WCB did not change these dates in the Updated Regulations, as the hope is that there will be a sufficient pool of funds to begin to provide PFL benefits by January 1, 2018, based on the contributions collected over the six-month period leading up to the effective date.
- Neither the Proposed Regulations nor the Updated Regulations provide guidance as to whether an employer may choose not to take payroll deductions for the employee contributions if the employer instead wishes to make the payments on behalf of its employees.
- Additionally, although not within the Updated Regulations, the New York State Department of Financial Services just 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 \$1.63 per week (0.126 percent of the statewide average weekly wage of \$1,296).

### **What New York Employers Should Do Now**

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

- Consider submitting comments to the Updated Regulations by June 23, 2017.
- Revise family leave policies to provide information regarding the PFLBL, including employees' right to leave and benefits and information on filing a claim for PFL benefits.
- Consider how the PFLBL will interact with any paid parental leave currently provided.
- Consider whether you will self-insure or obtain coverage through an insurance carrier.
- 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 on July 1, 2017.
- Review CBAs covering persons employed in New York State to assess what impact, if any, the PFLBL may have on contractual obligations, and consider whether to address PFLBL-related terms in contracts to be negotiated going forward.

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