

## New Regulations Proposed for New York's Paid Family Leave Benefits Law

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On February 22, 2017, the New York State Workers' Compensation Board published proposed [regulations](#) ("Proposed Regulations") to implement the [New York Paid Family Leave Benefits Law](#) ("PFLBL"), which goes into effect on January 1, 2018.<sup>1</sup>

When fully implemented, New York's PFLBL will provide up to 12 weeks of paid leave 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.

A covered employer<sup>2</sup> will be required to purchase paid family leave ("PFL") insurance coverage or self-insure.

Importantly, 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. However, in addition to other potential fines and penalties (as detailed below), employers that do not collect weekly employee contributions and fail to provide coverage by purchase of an insurance policy or self-insuring will be (i) responsible for the required PFL payouts to employees and (ii) ineligible to collect employee contributions for periods during which no PFL coverage was provided.

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<sup>1</sup> Also on February 22, 2017, the New York State Department of Finance issued [proposed regulations](#) for insurers regarding minimum standards for the form and rating of PFL benefits coverage.

<sup>2</sup> A "covered employer" is an employer that has one or more employees at least 30 days in any calendar year.

The Proposed Regulations provide guidance to employers, insurance carriers, and employees about their rights and responsibilities under the PFLBL. The public is invited to comment on the Proposed Regulations for 45 days following the date that they were published, or until April 8, 2017. Key provisions of the Proposed Regulations are summarized below.

## **Eligibility**

Beginning January 1, 2018, employees<sup>3</sup> who have worked for a covered employer full-time for 26 or more consecutive weeks (or part-time<sup>4</sup> for at least 175 days) during the period immediately preceding the first full day a requested period of family leave would begin will be eligible for PFL benefits. Beginning on January 1, 2018, employees will be eligible to receive up to eight weeks of paid leave. This will increase over the course of the following three years, so that employees will eventually be eligible for up to 12 weeks of paid leave by the time the PFLBL is fully implemented on January 1, 2021. Importantly, so long as the employee has been employed by the company and worked the requisite number of hours as of the effective date of January 1, 2018, he or she could be eligible to begin collecting benefits as of that date. (January 1, 2018, is not the date that length of service is measured for purposes of PFL eligibility.)

The Proposed Regulations state that 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, counts toward the employee's consecutive workweeks for purposes of determining eligibility for PFL (including paid vacation, personal, sick leave, holidays, or other approved time away from work), provided that, during the period of time off, the employer continues to make the required payroll contributions for that particular employee.

## **Waiver of PFL**

Employers must provide employees who are not eligible for PFL (i.e., those employees whose regular work schedules will yield fewer than 26 weeks, or 175 days for part-time employees, worked in the immediately prior 52-consecutive-week period) with the option to file a waiver of family leave benefits. This waiver would exempt the employee from the obligation to have PFL payroll contributions withheld from his or her wages, and as a result, the employee would not be eligible to receive PFL benefits. Any waiver will be automatically revoked within eight weeks following any change in the employee's regular work schedule that is expected to yield at least 26 weeks (or 175 days for part-time employees) worked in a 52-consecutive-week period. At that time, payroll contributions should begin, and once the employee reaches the eligibility threshold, the employee will become eligible to receive PFL benefits.

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<sup>3</sup> Individuals who employ domestic employees in their homes in New York should be aware that PFL is available to domestic employees, as well.

<sup>4</sup> Under the Proposed Regulations, "part-time employees" are those who are scheduled to work fewer than five days per week.

## Purposes for Leave

Eligible employees may take leave and receive PFL benefits for “family leave,” which is defined as leave:

- to participate in providing care, including physical or psychological care, for a family member of the employee made necessary by a serious health condition<sup>5</sup> of the family member; or
- to bond with the employee’s child<sup>6</sup> during the first 52 weeks after the child’s birth, or the first 52 weeks 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 on active duty (or has been notified of an impending call or order to active duty) in the U.S. Armed Forces.

Aside from any leave request requirements that normally apply when an employee requests a leave of absence from an employer, in order to complete a request for PFL, employees must submit to the insurance carrier (or self-insured employer) one of the following:

- a certification from a health care provider treating the family member;<sup>7</sup>
- 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).<sup>8</sup>

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<sup>5</sup> The definition of a “serious health condition” is the same as under the federal Family and Medical Leave Act (“FMLA”).

<sup>6</sup> 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*.

<sup>7</sup> New York State has not issued a certification form yet. Employers may be able to use the FMLA forms issued by the U.S. Department of Labor for this purpose. Further, a claim for PFL benefits may be denied if the employee is the perpetrator of domestic violence or child abuse against the care recipient.

<sup>8</sup> This information need only be provided once for any applicable call to active duty. Similar information can again be requested for a different call to active duty.

Unlike New York’s disability benefits, there will be no waiting period before employees become eligible to receive PFL benefits; benefits will be payable effective on the first full day when family leave is required.

**Family Leave Benefits—Payments and Annual Increases**

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

Date	Maximum Length of Benefits Within a 52-Consecutive-Week Period	Amount of Benefits
January 1, 2018	8 weeks	50% of average weekly wage, not to exceed 50% of the state average weekly wage
January 1, 2019	10 weeks	55% of average weekly wage, not to exceed 55% of the state average weekly wage
January 1, 2020	10 weeks	60% of average weekly wage, not to exceed 60% of the state average weekly wage
January 1, 2021	12 weeks	67% of average weekly wage, not to exceed 67% of the state average weekly wage

**Calculating Leave Under the PFLBL**

The Proposed Regulations establish that the 52-consecutive-week period is measured on a “rolling backwards” basis. The amount of available leave is measured by reviewing how much leave has been taken in the previous 52 weeks, as of the first date that PFL benefits would begin, to determine how much leave the employee may receive at that time. This tracks 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 already do so may wish to consider moving to a “rolling backwards” method of calculating leave eligibility.<sup>9</sup>

<sup>9</sup> 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

Although not specifically included in the PFLBL, the Proposed Regulations contemplate that employees who take PFL could do so through intermittent leave (as opposed to leave for a continuous period of time).

Part-time employees who take PFL in daily increments (rather than full weeks) will receive a proportional amount of leave, based on their regular schedule. For example, if a part-time employee regularly works three days per week, on January 1, 2018, the employee will become eligible for 60 percent of the 40 days (eight weeks) of leave available to full-time employees, such that the part-time employee would be eligible for up to 24 days of PFL.

### **Employee Contributions**

Premiums for the PFL program are fully funded through employee payroll contributions and administered by the New York State Workers' Compensation Board, which also administers New York State short-term disability benefits. Employers may begin to withhold the weekly employee contribution beginning July 1, 2017, for coverage to begin on January 1, 2018. The maximum employee contribution is expected to be set by June 1, 2017.

### **Notice to Employer**

Employees will be required to provide written notice to an employer prior to taking PFL. If the leave is foreseeable, employees must provide at least 30 days' notice.<sup>10</sup> If the leave is unforeseeable, notice must be provided as soon as practicable under the facts and circumstances surrounding the need for the leave (or generally within the time period set forth in the employer's usual and customary notice requirements for similar leave events). These requirements mirror the FMLA's notice requirements.

### **Application and Required Documentation**

Employees will be able to 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 will generally receive payment (or notice of denial of benefits) within 18 days of submitting the request. Additional certification and documentation requirements may be applicable, depending upon the reasons for leave. A list of documentation based on the reason for leave can be found on New York State's [PFL website](#).

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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, unless the Proposed Regulations are modified, FMLA eligibility and PFL eligibility may not run concurrently as they pertain to providing care to service members.

<sup>10</sup> If the leave is foreseeable and the employee fails to provide at least 30 days' notice, the carrier (or self-insured employer) may file a partial denial of the PFL claim for a period of up to 30 days from the date that the notice is provided by the employee.

## Receipt of Benefits

The carrier (or employer if the employer is self-insured) may provide PFL benefits via debit card, direct deposit, or check. If paying via debit card, the carrier or employer must provide written notice to the employee and obtain consent.<sup>11</sup>

## Interaction with Other Laws and Benefits

### *Disability Benefits*

Employees may not receive both disability benefits and PFL benefits for the same period of time. Further, employees who are also eligible for disability benefits may only receive a combined amount 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 benefits as FMLA leave, the employer must notify the employee of such designation (in accordance with the methods provided in the PFLBL and FMLA) or the employer will be deemed to have permitted the employee to receive PFL benefits without concurrently using FMLA leave.

### *Employer-Provided Benefits*

During any time that an employee is receiving PFL benefits, the employer may permit the employee to choose whether he or she will use accrued, unused paid time off (“PTO”) benefits to receive a full salary while on leave. Employers *may not require* that employees use such accrued, unused PTO benefits while receiving PFL benefits. However, 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.<sup>12</sup>

### *Health Benefits*

While an employee is receiving PFL benefits, employers will be required to maintain any existing health benefits on behalf of the employee.<sup>13</sup>

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<sup>11</sup> Given the [recent decision](#) by the New York State Industrial Board of Appeals regarding debit cards, the specific regulations regarding debit cards under the PFLBL may be subject to further review and revision. We will track these developments and advise of any changes.

<sup>12</sup> The Proposed 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.

<sup>13</sup> 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.

## **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**

When employees are entitled to receive family leave benefits under a collective bargaining agreement (“CBA”), the employer is relieved of providing PFL benefits, subject to the following:

- the CBA must provide benefits at least as favorable as those provided under the PFLBL in terms of length of leave and amount of benefits;
- the CBA may not provide employees with the ability to waive their rights to PFL, unless a waiver is otherwise permitted by law (e.g., the employees’ schedule does not provide for the required time period to be eligible for leave); and
- the CBA may have terms relating to family leave that differ from the PFLBL’s rules (again, those rules must be at least as favorable as under the PFLBL); however, where the CBA is silent or does not provide a different rule, the provisions of the PFLBL and its final regulations will apply.

## **Employer Requirements**

All New York employers will be required to maintain coverage under the PFLBL in the same way that such employers have disability benefits and workers’ compensation coverage.

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.<sup>14</sup> If there is no written policy, the employer must provide written guidance to each employee regarding the employee’s 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 weekly payroll for the period without coverage, plus a fine of up to \$500.

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<sup>14</sup> The Proposed Regulations do not specify the date by which handbooks must be amended. 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 deductions will be made from pay.

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 waive the right to collect applicable employee contributions for the period during which no coverage was provided.

Employers must post a notice about PFL rights, to be prepared by New York State, where it can be readily seen by all employees and/or applicants.<sup>15</sup>

### **Arbitration of PFL-Related Claims**

The Proposed Regulations establish an arbitration procedure for all claims related to PFL, including eligibility, benefit rate, and duration of paid leave. The arbitration procedure will be governed by the Workers' Compensation Law.

### **Additional Resources**

In addition to the Proposed Regulations, Governor Andrew Cuomo launched a new helpline and a new [website](#) to answer questions and provide New Yorkers with more information about the new program. The helpline may be reached at (844) 337-6303.

New York State also issued a [Request for Information](#) to solicit information from potential vendors and develop a leave plan for state employees. Responses to the Request for Information are due by March 16, 2017.

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

- Consider submitting comments to the Proposed Regulations or the Request for Information.
- 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.
- Review any FMLA policy to determine the method of calculating available leave and consider using the "rolling backwards" method to track the New York law. If the policy uses a different method, consider how that would impact PFL benefits.<sup>16</sup>

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<sup>15</sup> 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.

<sup>16</sup> Note that under the FMLA, while the employer may elect its method of calculating leave eligibility for most types of FMLA leave, servicemember family leave must be calculated on a "rolling forward" basis.

- 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 collective bargaining agreements 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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