

# LABOR & EMPLOYMENT

## >>ALERT

### NEW YORK STATE ADOPTS FINAL PAID FAMILY LEAVE REGULATIONS

On July 19, 2017, the New York State Workers' Compensation Board (the Board) issued its final regulations (Final Regulations) for the New York Paid Family Leave Benefits Law (PFL), which becomes effective January 1, 2018.

The New York State PFL Final Regulations will be phased in over four years and will ultimately provide up to 12 weeks of paid family leave during a rolling 52-week period for eligible employees who seek leave for:

- >> providing care for a close family member (i.e., a child, domestic partner, parent, grandparent, grandchild or spouse) with a serious health condition, including physical or psychological care;
- >> bonding with newborn children, or newly placed foster or adopted children; or
- >> qualifying exigency arising from a family member's service in the armed forces.

#### ELIGIBILITY

Employees whose regular schedule is 20 hours or more per week become eligible for PFL after 26 consecutive weeks of employment, and those whose regular schedules are less than 20 hours per week are eligible after 175 work days (not calendar days). The "consecutive requirement"

may be tolled during periods of absence that are due to the nature of that employment, such as planned breaks, and when employment is not terminated during those periods of absence. There are also various proof of eligibility requirements depending on the type of PFL (e.g., birth certificate, active duty orders, etc.).

#### REQUESTS FOR PFL

Similar to other family and medical leave laws, if the leave is foreseeable and based on an expected birth, adoption placement or other qualifying event, the employee must provide the employer with notice at least 30 days before the leave is set to begin. If the leave is not foreseeable, such as when a medical procedure is scheduled with less than 30 days' notice, then the employee should give notice as soon as practicable.

PFL benefits will be increased annually until their maximum in 2021 as follows:

- >> on January 1, 2018, at least eight weeks during any rolling 52-week period and at least 50% of the

#### THE BOTTOM LINE

Employers should review their existing family and medical leave policies and handbooks to ensure that the specifics of PFL are included by January 1, 2018.

Employers should also contact their disability insurance providers to discuss a PFL rider.

employee's average weekly wage or 50% of the state average weekly wage, whichever is less;

- >> on January 1, 2019, at least 10 weeks during any rolling 52-week period and at least 55% of the employee's average weekly wage or 55% of the state average weekly wage, whichever is less;
- >> on January 1, 2020, at least 10 weeks during any rolling 52-week period and at least 60% of employee's average weekly wage or 60% of the state average weekly wage, whichever is less; and

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>> on January 1, 2021, at least 12 weeks during any rolling 52-week period and at least 67% of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less.

Leave can be taken intermittently in weekly or daily increments. For daily leave, employees who regularly work at least five days per week may take up to a maximum of 60 days of PFL as of January 1, 2021, when the PFL benefits reach their maximum. For employees who regularly work less than five days per week, the maximum days are prorated based upon their schedule.

## BENEFITS

Employees may elect to supplement PFL leave benefits up to their full salary with accrued vacation or other personal leave time during PFL. Employers must continue to provide an employee with their existing health insurance benefits for the duration of the PFL as if they had not taken such leave and must reinstate them to the same or a comparable position upon their return, although the Final Regulations do not require accrual of seniority or other benefits during the duration of PFL.

If employees elect to take paid time off at 100% of his or her salary in lieu of his or her PFL benefits, the company

may request reimbursement from its insurance carrier for any PFL benefits that otherwise would be due to the employee.

## PFL FUNDING

Employers will not be ultimately responsible for funding PFL benefits. PFL is financed similarly to workers' compensation and state disability benefits. Funding will be through employee payroll deductions, however, employers may elect to cover the premium payments and not deduct contributions. Employees whose schedule never reaches 26 weeks or 175 days in a 52-week consecutive period must be given the option to waive PFL and not make contributions.

On June 1, 2017, the New York State Department of Financial Services issued a decision over the premium rate, which will be adjusted annually. The rate for 2018 is set at 0.126% of an employee's weekly wage up to and not to exceed the statewide average weekly wage, which is currently \$1.65. On July 1, 2017, employers became eligible to collect the weekly contribution in anticipation of any increased insurance premiums and to manage cash flow, but are not required to do so. Employers that take in more employee contributions than the annual premium bill, however, must return the difference to employees.

Premiums to fund the program will be deducted from employees' after-tax wages.

Employers are required to carry insurance similar to disability leave, which will support PFL. Employers' disability insurance carriers should be contacting them about a PFL rider.

## OTHER NUANCES

Unionized employers with leave provisions in their collective bargaining agreements that are at least as favorable to employees as the PFL program may be exempt from the law.

Family and Medical Leave Act (FMLA) and PFL leave generally run concurrently. If an employee is eligible for both FMLA and PFL, but the employee declines to apply for PFL, employers may still designate the leave as both FMLA and PFL leave. Unlike FMLA, PFL does not allow employees to claim the benefit for their own health conditions and covers significantly more employers.

Employees cannot collect both PFL and disability benefits at the same time. Combined, PFL and disability benefits must not amount to more than the 26-week benefit maximum during any 52 consecutive calendar weeks.

### ADDITIONAL PROVISIONS

PFL contains anti-discrimination and retaliation provisions for those who exercise their PFL rights. This includes a complaint procedure that will be administered by the Board.

Employers must also display or post a printed notice containing information about employee PFL rights. Although an official notice has not yet been approved, the Board is expected to promulgate a model notice prior to

January 1, 2018. Employers must include information concerning PFL in handbooks and should also consider providing written guidance to employees on how to file a claim.

Any claim-related dispute, including eligibility, benefit rate, and duration of paid leave, arising under the PFL is subject to arbitration. The process, including arbitrator appointment and fees, is specified in the new regulations.

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