

December 8, 2017

## New York State Paid Family Leave

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### **Effective January 1, 2018, Employers Must Provide Most Employees up to Eight Weeks of Family Leave with Pay Equal to 50% of the Employee's Average Weekly Wage as Limited by a Statutory Cap**

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#### **SUMMARY**

Effective January 1, 2018, the New York State Paid Family Leave Benefits Law will require almost every employer in the state to provide employees of a certain tenure with up to eight weeks of paid leave to care for a family member with a serious health condition, bond with a child within the first 12 months after the child's birth or adoption, or attend to family duties occasioned by the active military duty of the employee's spouse, domestic partner, child or parent. Although the law is similar to the federal Family Medical Leave Act, there are several important differences: in New York, leave is paid rather than unpaid; paid family leave may not be used for the employee's own serious health condition, including pregnancy disability; and the coverage is far more expansive, applying to employers of at least one employee and employees with tenure as brief as 175 days. New York's paid family leave is designed to be self-funding: the paid leave amounts will be paid for by post-tax employee payroll deductions, which employers must use to either purchase insurance or to self-fund. New York State is requiring that all insurance carriers add PFL coverage to existing disability policies as of January 1, 2018.

The maximum paid leave period will phase in over time, increasing to a maximum 12 weeks as of January 1, 2021. Leave may be taken intermittently, of durations as brief as one day. An employer may require that the paid leave entitlement run concurrently with FMLA leave. What is not clear in either the statute or the final regulations issued on July 19 by the Workers' Compensation Board is whether other employer-provided paid-time-off benefits may run concurrently with paid family leave.

## PROVISIONS OF NEW YORK PAID FAMILY LEAVE BENEFITS LAW

Set forth below is a summary of the principal provisions of the Paid Family Leave Benefits Law (“PFL”).<sup>1</sup>

**Covered Employers.** Employers with one or more employees for 30 or more days in a calendar year are required to comply.

**Eligibility.** Employees are eligible for Paid Family Leave benefits if they have worked for 26 consecutive weeks (if they work 20 or more hours per week) or 175 days (if they work less than 20 hours per week). The PFL applies only to employees who work in New York State. Domestic employees are covered under the law after four weeks of work provided the employee is employed 40 or more hours per week and works at least 30 days in any calendar year. Employees who only “incidentally” work in New York State are not eligible under the PFL; “incidentally” is not defined in the law or regulations. A non-eligible employee may file for a waiver of PFL benefits with his or her employer, which would exempt him or her from paying payroll contributions for the benefit.

**Uses of Leave Period.** Leave may be used for the following purposes:

- to participate in providing care, including physical or psychological care, for a family member<sup>2</sup> of the employee made necessary by a “serious health condition”<sup>3</sup> of the family member; or
- to bond with the employee’s child within 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 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.

The PFL benefit cannot be used for the employee’s own serious health condition; paid leave for an employee’s own serious health condition is governed by New York State’s Disability Benefits Law.

**Length of Leave Period and Benefit Amounts.** When fully phased in, the PFL will provide up to 12 weeks of leave during a consecutive 52-week period, along with job protection and continuation of existing health benefits. The PFL will be considered taxable non-wage income. The length of available leave benefits, and the amount of weekly benefits, will increase yearly:

- on January 1, 2018, 8 weeks of leave within a 52-week calendar period, with the amount of benefits equal to 50% of the employee’s average weekly wage, but not to exceed 50% of the state average weekly wage (currently \$652.50 per week);
- on January 1, 2019, 10 weeks of leave with the amount of benefits equal to 55% of the employee’s average weekly wage, but not to exceed 55% of the state average weekly wage;
- on January 1, 2020, 10 weeks of leave with the amount of benefits equal to 60% of the employee’s average weekly wage, but not to exceed 60% of the state average weekly wage; and
- on January 1, 2021, up to 12 weeks of leave with the amount of benefits equal to 67% of the employee’s average weekly wage, but not to exceed 67% of the state average weekly wage.

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Leave may be taken intermittently, including increments as short as one full day.

***Funding Mechanism.*** PFL will be fully funded by post-tax employee payroll deductions, at a rate of 0.126% of each employee's average weekly wage, up to the statewide average weekly wage of \$1,305.92 (a \$67,901 maximum annual income). For example, an employee with an annual salary of \$50,000 will pay a \$1.21 weekly premium, or \$63 per year. Employers must use employee contributions either to purchase a PFL policy from an insurance carrier or to self-fund a policy. New York State is requiring that all insurance carriers add PFL coverage to existing disability policies as of January 1, 2018.

***Requesting and Obtaining Leave.*** Eligible employees may apply for leave using a "Request for Paid Family Leave and Certification" form, provided by New York State and submitted to the insurance carrier (or self-insured employer). Alternative forms containing the same information are permissible. If the need for leave is foreseeable (such as planned medical treatment for a serious health condition of a family member, or an expected birth, placement for adoption or foster care), then eligible employees must provide at least 30 days' notice to their employer. If the need for family leave is not foreseeable, the employee must provide notice to their employer as soon as practicable. The PFL sets out the required documentation employees must provide to certify their eligibility for leave (e.g., a medical certification from a health care provider).

***Notice Requirements, Anti-retaliation and Enforcement Provisions.*** Employers must post a PFL notice of rights, made available by New York State, in a location where it can be readily seen by all employees. If an employer has a handbook containing information about employee benefits or leave rights, then the handbook must additionally include information regarding leave and employee obligations under the PFL. Employers without handbooks will be required to provide written notice to employees of their rights and obligations, including how to file a PFL claim. Employers may not discriminate or retaliate against employees who take paid family leave. The PFL guarantees reinstatement to the same or comparable position after leave is taken. Failure to provide paid family leave coverage will expose covered employers to fines of up to 0.5% of weekly payroll for the period the employer was without coverage, and an additional sum of not more than \$500. Employers failing to collect contributions or provide coverage will be fully liable for PFL benefit payments. Finally, the PFL provides that disputes related to the benefit will be settled by arbitration, governed by procedures under the New York Workers' Compensation Law.

***Available Guidance.*** New York State has published two fact sheets regarding the PFL, one for employees and one for employers, which are available [here](#). And the New York State Department of Taxation and Finance issued guidance regarding certain tax implications of the law, available [here](#).

## INTERPLAY WITH OTHER LEAVE BENEFITS

### New York State Disability Benefits Law

New York State requires employers to provide disability benefits coverage to employees for an off-the-job injury or illness, up to a maximum paid benefit of 26 weeks' leave. The PFL states that employees may take a combined maximum of 26 weeks of disability leave and paid family leave in any 52-week period, and may not receive disability and paid family leave benefits at the same time.

### The Family and Medical Leave Act

If an employee's leave qualifies for both FMLA and PFL, an employer may require these leaves to run concurrently. However, note that FMLA leave taken by an employee for his or her *own* serious health condition does not qualify for coverage under the PFL. For example, an employee may take 12 weeks of unpaid FMLA leave for a pregnancy- or childbirth-related disability and thereafter use the paid family leave benefit to bond with the child.

### Other employer-provided benefits

The law provides that employers may permit employees receiving paid family leave benefits to concurrently use part or all of their accrued, unused paid-time-off benefits (such as vacation, sick or personal days), thereby enabling employees to receive their full salary while on leave. Should an employee elect to do so, the employer may request reimbursement for the PFL benefit from the insurance carrier. What is not clear in the law or regulations is whether employers may *require* employees to use such paid-time-off benefits concurrently with PFL benefits. For example, assume that a pregnant employee uses paid disability leave for the eight weeks following childbirth. Thereafter, the employee would like to remain at home with her child as a primary caregiver. She would be entitled to use the benefits provided under the PFL to do so (immediately following the birth of her child or at any point within the first 12 months after birth). But if her employer separately provides paid child care leave, it is not clear whether the employer may require that such separate paid leave run concurrently with the State's paid family leave benefit, as the PFL explicitly allows it to do with FMLA leave.

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## ENDNOTES

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- <sup>1</sup> N.Y. Work. Comp. L. §§ 200-242.
- <sup>2</sup> "Family member" means a child, parent (including parent-in-law), grandparent, grandchild, spouse or domestic partner.
- <sup>3</sup> "Serious health condition" has the same definition as that under the FMLA, which is defined at 29 C.F.R. § 825.113.

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## CONTACTS

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### New York

Tracy Richelle High	+1-212-558-4728	<a href="mailto:hight@sullcrom.com">hight@sullcrom.com</a>
Theodore O. Rogers Jr.	+1-212-558-3467	<a href="mailto:rogersto@sullcrom.com">rogersto@sullcrom.com</a>

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### Washington, D.C.

Julia M. Jordan	+1-202-956-7535	<a href="mailto:jordanjm@sullcrom.com">jordanjm@sullcrom.com</a>
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