

New York Proposes Regulations for Paid Family Leave

Last year, New York enacted a comprehensive paid family leave law. When fully implemented, it will provide eligible employees up to 12 weeks of paid leave during a 52-week period, funded by employee contributions and administered through the state’s temporary disability insurance program. On February 22, the New York Workers Compensation Board issued proposed regulations to phase in the new benefit, beginning in 2018. Employers should begin planning to integrate the new entitlement into their current leave programs and payroll practices.

In this issue: [Proposed Regulations](#) | [Coverage](#) | [PFL Benefits](#) | [Employer Obligations](#) | [Employee Obligations](#) | [Notice and Posting Requirements](#) | [Penalties for Noncompliance](#) | [Interaction with FMLA and Other Leaves](#) | [Arbitration](#) | [In Closing](#)

Background

On April 4, 2016, New York enacted the Paid Family Leave Law (PFL), effective January 1, 2018. Like California, New Jersey and Rhode Island, New York will require employers to provide – but not pay for – a family leave benefit. Rather, PFL benefits will be employee-funded and administered through the state’s temporary disability insurance (TDI) program. (See our [April 26, 2016 For Your Information.](#))

When fully implemented in 2021, New York’s PFL program will offer eligible employees up to 12 weeks of paid leave benefits in a 52-week period to: care for a family member with a serious health condition; bond with a newborn, adopted or foster child; or deal with a qualifying exigency arising from a family member’s active military duty.

Comment. While PFL benefits will not be not available for an employee’s own serious health condition, New York employers are statutorily required to provide short-term disability (STD) coverage for off-the-job injuries and illnesses. Employees who are temporarily unable to work due to a non-work related disability (including pregnancy and childbirth) are eligible for up to 26 weeks of STD benefits during a 52-week period under New York’s TDI program.



Proposed Regulations

On February 22, the New York Workers Compensation Board issued [proposed regulations](#) to implement the leave benefit that will be phased in over four years beginning in 2018 and, more recently, [FAQs](#) were posted on a state website. Key PFL provisions are highlighted below.

Coverage

Employers that employ one or more employees on at least 30 days in any calendar year will be required to provide PFL benefits through a private insurance carrier, the state insurance program, or by self-insuring. While the new law covers virtually all private employers in New York, it does not automatically cover public employers. However, they will be able to opt into the PFL program if they so choose.

Employee Eligibility

Employees who have worked full-time for a covered employer for at least 26 consecutive weeks (or 175 days part-time) immediately preceding leave will be eligible for PFL benefits, regardless of the number of hours they worked. For these purposes, part-time employees are defined as those who are scheduled to work less than five days per week.

Counting Weeks Worked. In determining PFL eligibility, scheduled vacation time, PTO, sick or other employer-approved absences from work where the employee is still considered to be an employee will be counted as consecutive weeks or consecutive work weeks, provided the required employee contributions have been made for that time. However, periods of temporary disability will not be counted as weeks of employment for eligibility purposes.

Waivers. While employees generally cannot waive their PFL rights prospectively, the proposed regulations would allow an employee whose regular work schedule is less than 26 weeks (or 175 days) in a 52-consecutive week period to file a waiver of PFL benefits. As long as the waiver remains in effect, it will exempt the employee from making payroll contributions and the employer from providing the employee PFL benefits.

Collective Bargaining Agreements. Covered employers will not be required to provide PFL benefits to employees who are entitled to receive family leave benefits under a collective bargaining agreement (CBA), as long as it provides benefits that are at least as favorable as set forth in the regulations. While a CBA may provide rules related to paid family leave that differ from PFL requirements, it may not allow an eligible employee to waive his or her rights to paid family leave, unless permitted by the regulations.

PFL Benefits

Employees will be entitled to PFL benefits on or after January 1, 2018. When the new law is fully implemented in 2021, employees will be eligible for up to 12 weeks (60 days) of PFL benefits during a period of 52 consecutive weeks, with benefits capped at the lesser of two-thirds (67 percent) of either the employee's average weekly wage (AWW) or the state's average weekly wage (NYSAWW). Benefits will be phased in according to the following schedule.

FMLA Coverage and Eligibility Criteria

By contrast, the FMLA covers both public- and private-sector employers with 50 or more employees. Employees of covered employers are eligible for up to 12 weeks of unpaid, job-protected FMLA leave in a 12-month period, but only if they satisfy the following criteria. They must have worked for their employer for at least 12 months and 1,250 hours over the 12 months preceding leave, and work at a location where the employer has 50 or more employees within 75 miles.

Date	Maximum PFL Leave in 52-Consecutive Week Period	PFL Benefit Rate*
January 1, 2018	8 weeks	50% of employee's AWW or 50% of NYSAWW, whichever is less
January 1, 2019	10 weeks	55% of employee's AWW or 55% of NYSAWW, whichever is less
January 1, 2020	10 weeks	60% of employee's AWW or 60% of NYSAWW, whichever is less
January 1, 2021	12 weeks	67% of employee's AWW or 67% of NYSAWW, whichever is less

* The NYSAWW is updated by the New York Department of Labor annually on July 1 and is available [here](#).

Unlike the statutory STD benefit, eligible employees have no waiting period for PFL benefits. Full-time employees will be eligible for the benefits shown above for qualifying PFL leave, and part-time employees will be eligible to receive a pro-rata portion.

52 Consecutive Weeks

The proposed regulations clarify that an employee's available leave time would be calculated on a rolling period, with the 52-consecutive calendar week period computed *retroactively* for each day for which benefits are claimed. An employee would be able to submit a single claim for periodic family leave, but the claim cannot cover more than 52 weeks. Rather, the employee will have to submit a new claim at the end of the 52-week period.

Comment. The requirement to calculate the availability of PFL leave retroactively may complicate leave administration for employers that use a different method to compute availability of FMLA leave.

Birth, Adoption and Foster Care Placement (“Baby Bonding”)

For PFL purposes, the proposed regulations clarify that eligibility for baby bonding leave begins on the date of the child's birth, adoption or foster care placement with the employee and ends after 52 consecutive weeks. Notably, PFL benefits for baby bonding leave will be available on or after January 1, 2018, even if the child's birth or placement occurred before that date. The regulations also make clear that an employee may opt to receive disability and family leave benefits during the post-partum period, but may not receive both benefits at the same time.

Method of Payment

Like wages, PFL benefits may be paid by debit card, direct deposit or check. While the proposed regulations allow the employee to choose the method of payment, they also allow the carrier or self-insured employer to eliminate the check option (unless the employee certifies a need) and use a default payment method in the event the employee fails to choose a payment method.

Employer Obligations

While the PFL benefit will be funded by mandatory employee contributions and paid by the state, the law will require covered employers to:

- Collect weekly employee contributions through payroll deduction
- Provide coverage by either purchasing PFL insurance coverage or self-insuring

The state is expected to set the maximum employee contribution by June 2017. The proposed regulations would allow – but not require – employers to begin weekly withholding on July 1, 2017 for coverage beginning on January 1, 2018.

Comment. A disability benefits policy issued to satisfy a covered employer's statutory obligations must also provide PFL coverage as of January 1, 2018. Employers will want to work with their carrier to amend their policies, as needed, to ensure coverage.

Continuation of Health Coverage. Both the FMLA and the PFL require the employer to continue group health insurance coverage during leave on the same terms as if the employee had continued to work. While an employee's group health insurance benefits must be maintained during the PFL-qualifying leave, the employee must continue to make any normal premium contributions.

Reinstatement. Like FMLA leave, PFL leave is job-protected, and an employer must reinstate an employee returning from qualifying leave to the same or similar position occupied prior to taking leave.

Employee Obligations

Employees will be required to provide at least 30 days' advance notice for PFL leave if the qualifying event is foreseeable (e.g., an expected birth). When less than 30 days' notice is provided, the self-insured employer or insurance carrier may file a partial denial of the PFL claim for a period of up to 30 days from the date notice was provided. When leave is unforeseeable, employees will be required to provide notice as soon as practicable.

Where a covered employer's rules about requesting leave are less stringent than the regulations', the employer generally may require an employee to comply with its usual and customary notice requirements and procedures for requesting leave. Where an employee does not comply with the employer's usual requirements, PFL may be delayed or denied, absent unusual circumstances.

PFL Requests

Employees will generally be required to complete a form provided by the state to request PFL. A draft PFL-1 form can be accessed [here](#). Employers and carriers can use alternative forms, provided they contain all the information required in the state form. Employees may also provide notice of a claim in another format designated by the insurance carrier or self-insured employer, including via an electronic portal or telephone.



Employers will have to complete the employer information section (Part B of form PFL-1), or any other carrier or self-insured employer designated format, and return it to the employee within three business days of a request for PFL leave. The employee must then submit a

completed PFL request together with the employer information, and any necessary certifications or other documentation to the carrier, self-insured employer or designated third-party administrator (such as a medical certification, birth certificate, court or other placement document).

No benefits will have to be paid until the complete package has been submitted to the carrier. Payment must be completed as soon as possible, but no later than 18 days from the date of the request unless the requested payment is for a previously unspecified day of family leave. In that case, payment must be made within 30 days of the leave.

Notice and Posting Requirements

Covered employers will have to update their employee handbooks to include information concerning PFL rights and employee obligations. Employers that do not that maintain handbooks will still have to provide an employee notice of PFL rights and obligations, including how to file a claim. In addition, employers will have a workplace posting requirement.

Penalties for Noncompliance

The regulations clarify that failure to provide paid family leave coverage, withhold employee contributions or maintain employee health coverage during PFL leave can expose the employer to penalties and liability for noncompliance.

PFL Coverage

A covered employer that fails to provide paid family leave coverage will be liable for a fine of up to 0.5 percent of its weekly payroll for the period the employer was without coverage and an additional sum of up to \$500, to be paid into the Special Fund for Disability Benefits. It will also be responsible for PFL payments to employees and unable to collect employee contributions for any period for which PFL coverage was not provided.

Continued Health Coverage

A covered employer will be liable for medical costs incurred during PFL leave if it did not continue the employee's health insurance coverage during the leave period.

Employee Contributions

If the employer fails to collect employee contributions and provide PFL coverage, it will be liable for paying PFL benefits and waives employees' contributions for the period when no coverage was provided. If a covered employer collects employee contributions but fails to use them to purchase PFL coverage, the employer must refund the contributions.

Interaction with FMLA and Other Leaves

Leave available under the FMLA will run concurrently with PFL, provided the employer designates the PFL benefits period as FMLA-qualifying and gives the employee required notice. The employer's failure to provide notice will allow the employee to receive PFL benefits without concurrently using available FMLA benefits. When FMLA leave is taken in less than full day increments, the employer may track the hours taken for any day in which the employee is paid and works at least part of the day. When the total number of hours taken for FMLA leave equals the hours in an employee's usual work day, the employer may deduct one day of PFL from the employee's annual available benefit. However, the employer will not be entitled to reimbursement from its carrier for FMLA hours paid.

Unlike under the FMLA, an employer may not require employees to use accrued paid vacation or other PTO to offset all or part of their PFL leave time for which they may receive less than full salary. However, an employer may offer employees that option. If an employee elects to use vacation or PTO to supplement PFL benefits, the employer may request reimbursement from the insurance carrier prior to its payment of PFL benefits. Employees who make this election will still enjoy job-protected leave, but they will not be entitled to use more than 12 weeks of PFL in any consecutive 52-week period.

The proposed regulations clarify that an eligible employee may not receive both PFL and disability benefits for the same period. An employee who is eligible for both disability benefits and family leave may not receive more than 26 weeks of disability and family leave benefits combined during the same 52-consecutive calendar week period.

Arbitration

Claim-related disputes, including regarding eligibility, benefit rate and duration of PFL, will be settled by arbitration.

In Closing

The new paid family leave benefit will phased in, beginning in 2018. The proposed regulations are open to public comment until April 8. Employers will want to familiarize themselves with the regulations as they are finalized, and consider how best to integrate the new entitlement into existing leave programs and payroll practices.

Authors

Nancy Vary, JD
Abe Dubin, JD

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