

New York Adopts Final Paid Family Leave Rules

On July 19, the New York Workers' Compensation Board released final regulations implementing the New York Paid Family Leave law, which will be effective January 1, 2018. The regulations are substantively unchanged from the revised regulations proposed in May. Employers should finalize strategies to harmonize the state's new paid family leave program with existing leave programs, and adjust their payroll practices to ensure compliance.

Background

Last year, New York enacted the Paid Family Leave Law (PFL) that will go into effect January 1, 2018. When fully phased in, the PFL program will provide eligible employees up to 12 weeks of PFL benefits in a 52-week period to: care for a family member with a serious health condition; bond with a child; or deal with a qualifying exigency arising from a family member's active military duty. Benefits will be employee-funded and administered through the state's temporary disability insurance (TDI) program. (See our [April 26, 2016 For Your Information.](#))

On February 22, the New York Workers' Compensation Board (board) proposed regulations to implement the new leave benefit. (See our [March 29, 2017 For Your Information.](#)) On May 24, the board proposed revised regulations containing a number of important changes and clarifications. (See our [June 19, 2017 For Your Information.](#))

Final Regulations Adopted

On July 19, the board released [final regulations](#) implementing the PFL law that are substantively unchanged from the revised regulations it proposed in May. Key changes and clarifications included in the final regulations are highlighted below.



Comment. The board's [Assessment of Public Comment on Revised Proposed Regulations](#) (assessment) indicates that it will issue further guidance on what restoring an employee to the "same or comparable" position following PFL leave means and whether it tracks FMLA's "same or equivalent" standard. Also, as they arise, additional examples on the application of the final regulations are expected to be added to the published answers to previously posted FAQs on the PFL program's webpage.

Eligibility

The regulations confirm that the PFL does not cover independent contractors, persons “engaged in a professional or teaching capacity in or for a religious, charitable or educational institution,” and other specified individuals.

The regulations eliminate the distinction between full-time and part-time employees, and confirm that employees who are regularly scheduled to work at least 20 hours per week will be eligible for PFL benefits after 26 consecutive work weeks. Employees whose regular work schedule is fewer than 20 hours per week will be eligible after the 175th day worked in a consecutive 52-week period.

The board also clarified that employees who work in New York state and only incidentally out of state are benefit eligible, while employees who work out of state and only incidentally in New York are not covered. However, an employee who does not work in any other single state is covered if some of the work is performed in New York and the employee is: based in New York; controlled from New York; or lives in New York.

Calculating Eligibility

The regulations add a new paragraph providing that the 26-consecutive week of employment requirement may be tolled “during periods of absence that are due to the nature of that employment, such as semester breaks, and when employment is not terminated during those periods of absence.” In its assessment, the board said the change was meant “to clarify that certain jobs, like professors, have built-in breaks and that these do not restart the period of employment for purposes of eligibility for paid family leave.”

The regulations have also been amended to clarify that the use of scheduled vacation time or other PTO is counted as consecutive weeks or work weeks, as well as days worked, in determining benefits eligibility. However, periods of disability will not be counted as weeks of employment or days worked.

Mandated Waivers

Employees who will not satisfy the minimum eligibility criteria for PFL benefits may file a waiver, allowing them to avoid providing weekly contributions. In a notable shift, the final regulations require – rather than simply permit – employers to offer a waiver option to any employees who are expected to be ineligible for PFL benefits.

Benefit Calculations

The regulations provide that the week the employee goes on leave would not be counted as part of the eight-week look-back period when calculating an employee’s average daily rate of pay for intermittent leave. They also clarify that the average number of days worked per week can include fractional days to convert an employee’s average weekly wage to an average daily wage.

Interplay with NYC Earned Sick Time Act

The regulations allow an employer to offer – and an employee to elect – to use accruals or other PTO to receive full salary while on paid family leave. However, they did not address the interplay between the PFL and the New York City Earned Sick Time Act, which remains somewhat unclear. (See our [March 18, 2016 For Your Information.](#)) In its assessment, the board said if the sick leave time rules allow an employee to use accrued time off to care for a seriously ill family member, and not for the employee’s own illness, it would fall within the regulations. However, leave for an employee’s own illness would not qualify for PFL benefits. Neither could an employee collect PFL benefits while receiving disability benefits or workers’ compensation payments.

Collectively Bargained Benefits

The regulations clarify that an employer is not required to supply PFL coverage for employees subject to a collective bargaining agreement (CBA) if the CBA provides paid family leave benefits that are at least as favorable as the PFL's and does not permit eligible employees to waive their rights to paid family leave or opt out of Article 9 except as the regulations permit.

Employee Contributions and Payroll Deductions

On June 1, the Department of Financial Services (DFS) [set](#) the premium rate for PFL benefits and maximum employee contribution for coverage beginning January 1, 2018. For calendar year 2018, the maximum premium rate and the weekly employee contribution will be 0.126% of an employee's average weekly wage capped at the state's average weekly wage – currently [\\$1,305.92](#). The final regulations confirm that employers may – but are not required to – begin collecting employee contributions through payroll deductions as early as July 1, 2017.

In Closing

Employers should finalize strategies to harmonize the state's new paid family leave program with existing leave programs, secure coverage for PFL benefits, and adjust their payroll practices to ensure compliance.

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