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New York Finalizes Paid Family Leave Regulations

As we previously reported, beginning January 1, 2018, many employees in New York State will be eligible for paid family leave under New York's Paid Family Leave ("PFL") legislation. In anticipation of the PFL law's effective date, the Workers Compensation Board has issued final regulations clarifying certain aspects of the law. The below provides some guidance on how PFL is expected to operate, how it compares to existing leave laws, such as the Family and Medical Leave Act ("FMLA"), and how employers should prepare for this new employee entitlement.

Who is Eligible for PFL?

PFL applies to virtually all employers – employing only one employee for 30 days in any calendar year is sufficient to establish coverage. After 26 consecutive weeks of employment, a full-time employee, defined as an employee whose regular schedule is 20 or more hours per week, may take PFL. Part-time employees, who the regulations define as working less than 20 hours per week, become eligible for PFL benefits after working 175 days. The regulations clarify that periods of approved vacation, personal, sick or other time off count toward the above periods of employment, as long as the required PFL contributions are paid during such time. However, periods of temporary disability under New York's state disability law are not counted.

PFL, therefore, applies to more employers and employees than the FMLA, which requires 50 employees for employer coverage and a longer duration of employment (one year and 1,250 hours) before an employee is eligible for leave.

How Can Employees Use PFL?

Under New York's PFL law, eligible employees may receive paid, job-protected leave for three reasons: (1) to participate in providing physical or psychological care for a family member with a serious health condition; (2) to bond with a child within 12 months of the birth, adoption or foster care placement of the child, or (3) for a "qualifying exigency" (as defined by the FMLA) arising out of the fact that an employee's parent, child, spouse, or domestic partner has been called, or notified of an impending call, to military service.

Unlike the FMLA, PFL is not available for an employee's own serious health condition. In those instances, employees instead must look to short-term disability, FMLA, and (if applicable) paid sick leave under local law or an employer's policy.

What Does it Mean to Provide Care to a Covered Family Member with a Serious Health Condition?

"Serious health condition" under the PFL statute is defined much as in the FMLA, but omits

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incapacity due to pregnancy or prenatal care as an explicitly listed covered condition.

The definition of a covered "family member" is broader in the PFL legislation than in the FMLA. Although both PFL and the FMLA allow leave to care for a parent or child, the definition of "child" in the PFL law does not limit the child's age, and the definition of "parent" explicitly includes a parent-in-law. "Family Members" under the PFL law also include grandparents, grandchildren, and domestic partners, as well as spouses.

An employee is "providing care" under the PFL law if the employee is in "close and continuing proximity" to the family member and is engaging in activities such as physical care, emotional support, visitation, transportation, and assistance with essential activities of daily living. Generally, employees must be present at the same location as the family member during the majority of the employment period of leave. Reasonable periods of separation, such as travel to obtain medication or to arrange for care, are acceptable.

How Does PFL Operate?

The Workers Compensation Board administers PFL. Like state disability benefits, PFL wage replacement benefits are provided by state-regulated insurance programs funded by employee wage deductions. However, unlike state disability, there is no waiting period for PFL – paid leave is available from the first full day when it is required. The amount of pay an employee receives while on PFL, and the duration of that leave, is set to increase over the next four years as follows:

DATE	DURATION OF LEAVE	PERCENTAGE OF PAY
January 1, 2018	Up to 8 weeks of leave in any 52-calendar week period	50% of the employee's average weekly wage[1], or 50% of State Avg. Weekly Wage, whichever is less
January 1, 2019[2]	Up to 10 weeks of leave in any 52-calendar week period	55% of the employee's average weekly wage, or 55% of State Avg. Weekly Wage, whichever is less
January 1, 2020	Up to 10 weeks of leave in any 52-calendar week period	60% of the employee's average weekly wage, or 60% of State Avg. Weekly Wage, whichever is less
January 1, 2021	Up to 12 weeks of leave in any 52-calendar week period	67% of the employee's average weekly wage, or 67% of State Avg. Weekly Wage, whichever is less

[1] Average weekly wage is the greater of the total wages of the employee for the eight weeks (or portion thereof) (i) immediately preceding and including the last day worked before the first day of PFL or (ii) immediately preceding and excluding the week in which PFL began, divided by the total weeks.

[2] The Superintendent of Financial Services is authorized to delay the increase in PFL benefits based on a variety of factors. However, if the benefit is delayed, the PFL benefit that takes effect following the delay will be the same benefit level that would have taken effect had there been no delay.

The regulations state that the 52-calendar week period is computed retroactively for each day for which benefits are sought. Therefore, if an employee wants to start PFL on April 1, 2018, the employer must look back 52-weeks from that date to see what PFL or state disability leave an employee has taken during that time period. Employers should note that this is slightly different than the FMLA, which offers four options for measuring the applicable 12-month period. Employers who do not apply a rolling 12-month lookback for FMLA leave should therefore exercise great care when tracking FMLA and PFL leave, as the method of look-back may also lead to different entitlements.

If two family members work for the same employer, the employer can prohibit the family members from taking PFL at the same time to care for the same family member, but cannot otherwise cap the amount of leave provided under the law.

As with FMLA leave, the employer must maintain the employee's health benefits for the duration of PFL under the same conditions as if the employee had continued to work. The employee must continue to make any regular contributions to the cost of health insurance premiums while on PFL. Employees who do not continue paying their health insurance premiums may lose coverage. Employers must follow specific notice procedures in order to drop coverage for an employee due to late premium payment. Even if coverage lapses due to non-payment, or because the employee elects not to retain health insurance during PFL, such coverage much be restored upon the employee's return from PFL.

Is There Anything Special About Bonding Leave?

Employees may take PFL for bonding during the consecutive 52-week period following the child's birth. Employees may utilize PFL before placement or adoption of a child if the absence is required for placement or adoption (e.g., appearances in court, consultations with doctors or attorneys, travel to another country to complete the adoption). However, taking such leave will start the PFL clock: PFL for adoption or foster care expires at the end of the consecutive 52-week period beginning either on the date of the placement *or* the first day leave was taken for placement/adoption reasons. Although the regulations are not entirely clear on this point, it appears that the expiration for adoption/placement leave would occur on the earlier of the above.

Leave for pregnancy and childbirth raises complications for leave administration. Because PFL cannot be taken for an employee's own serious health condition, pregnant employees may elect to take the "standard" 6 – 8 weeks of state disability leave post-partum, and *then* take the 8-12 weeks of PFL for bonding following disability leave; resulting in leave in excess of what is required under the FMLA alone.

Of note for employers with employees who have welcomed or will welcome a child in 2017 is that the regulations allow such employees to seek PFL benefits for bonding with that child on or after January 1, 2018, as long as the leave is taken within 52 weeks after birth or placement. The employee is entitled to use PFL for bonding purposes on or after January 1, *even if* the employee has already taken and exhausted his or her FMLA or other parental or bonding leave in 2017.

What Notice is Required (From Employer and Employee)?

The employee notice requirements mirror the FMLA: if need for PFL is foreseeable, the employee

must provide at least 30 days notice of the need for PFL leave; if the need is unforeseeable, notice should be provided as soon as practicable, taking into account all of the applicable facts and circumstances. If the dates of the leave change or are extended, employees should also notify the employer as soon as practicable. The employee does not need to mention family leave or the PFL law to assert his or her request for PFL; however, like with a request for FMLA leave, the employee needs to provide enough information to make the employer aware of the qualifying event, the anticipated timing, and the duration of leave. Failure to provide notice of foreseeable leave 30 days in advance may result in a partial denial of PFL for up to 30 days from the date notice is provided.

Within three business days of receiving a request for PFL from an employee, the employer must complete the employer information section of the applicable PFL request form and return it to the employee. The employee must then submit the completed request to the insurance carrier or administrator. An employee may be required to submit certain certifications to the insurer in support of their leave. For example, employees seeking PFL to care for a covered family member may need to submit a medical certification for the covered family member setting forth, among other things, the health condition for which PFL is requested, its duration, and whether care is needed continuously or on an intermittent basis. Employees may also be required to present certifications and other information for qualified exigency (e.g., active duty orders) and bonding leave (e.g., birth certificate, document stating the adoption is in process). The carrier is not obligated to pay any benefits unless and until the necessary documentation, including applicable certifications, have been submitted.

Employers are required to include information about PFL rights in their handbook or in any other guidance they maintain on employee benefits, or to develop a separate PFL policy if the employer does not already have such written manuals. Employers must also post a PFL notice of rights in a form that will be prescribed by the Chair of the Workers' Compensation Board.

What About Intermittent PFL?

In contrast to the FMLA, which permits employees to take intermittent FMLA leave in the shortest increments of time (not greater than one hour) used by the employer to track other forms of leave, PFL may only be taken in full-day increments. Thus, when an employee works part of the day and then takes intermittent leave for the remainder of the day for a reason covered by both FMLA and PFL, the employer may count the hours only against the employee's FMLA entitlement. The employee will not be eligible for PFL under those circumstances because he or she worked part of the day for remuneration. However, once the employee's aggregate use of intermittent FMLA hours equals the number of hours in the employee's usual work day, the employer may deduct one day of PFL benefits from the employee's available entitlement (provided the leave was also taken for PFL-covered reasons). The employer may not, however, seek reimbursement from its carrier for such paid FMLA hours.

Employees who take intermittent PFL or PFL for less than a full week may be paid in increments of one full day or one-fifth of the weekly benefit. For leave taken in daily increments, the maximum period of PFL is based on the average number of days worked per week, up to 60 days per year for employees who work five days per week (based on 12 weeks of PFL). The regulations provide the following example: on January 1, 2018, an employee who works three

days per week is entitled to a maximum of 24 days of PFL in any 52-consecutive week period (three days per week multiplied by the eight week entitlement).[3]

Employers may require an employee who takes intermittent PFL to provide notice as soon as practicable before *each day* of intermittent leave.

How Much Can an Employer Deduct for PFL Coverage?

Although eligible employees may not utilize PFL until January 1, 2018, employers may begin making applicable deductions from employees' pay at this time to cover the expected PFL premiums. On June 1, 2017, the Superintendent of Financial Services determined that the current maximum employee contribution is 0.126% of an employee's weekly wage or the statewide average weekly wage (whichever is lower). The average weekly wage is presently $1,305.92, so the maximum deduction employees should expect at this time is $1.65 per week. The New York State Department of Taxation and Finance recently clarified that these deductions are *after-tax*. If the employee deductions exceed the annual premium, any surplus must be returned to the employees. An employer may also withhold deductions from new employees before they become eligible for PFL. However, an employer may not collect contributions from an employee who is not yet eligible for PFL while that employee is taking disability leave. If the employer fails to withhold deductions, the employer cannot withhold more than the maximum contribution at a later date as "catch-up" payments.

Do Employees Have Reinstatement Rights?

Employees are entitled to be returned to the position they held at the start of PFL or a comparable position with comparable benefits, pay, and other terms and conditions of employment. The Board has stated that it intends to issue further guidance clarifying what "the same or comparable position" means, but has not done so as of the date of this alert. Employees are not entitled to accrue any seniority or benefits while on leave, but they cannot lose any benefit they accrued prior to utilizing PFL.

How Does PFL Interact With Other Leave?

FMLA

FMLA and PFL leave may run concurrently to the extent they overlap; however, given the differences between the two statutes, there may be instances where an employee uses one form of leave without the other. For example, in 2018, an employee may take 12 weeks of FMLA leave for their own qualifying serious health condition and could thereafter take 8 weeks of PFL in that same 52-week period to bond with a new child or care for a sick parent. Employers must therefore be diligent about separately tracking qualifying leave under each statute to avoid running afoul of applicable law.

When PFL and FMLA leave run concurrently, the employer must notify the employee of the concurrent designation; if the employer does not, the employer will be deemed to have permitted the eligible employee to use PFL *alone*. If the employee is informed of the dual designation and

[3] The average daily rate for daily leave is calculated by dividing the employee's average weekly wage (calculated as described in footnote 1) by the average number of days the employee worked per week over that same eight-week period.

declines to apply for PFL payments, the employer and the insurance carrier may nonetheless count the leave against the employee's maximum PFL allotment.

If PFL is also designated by the employer as FMLA leave, employers may require employees to use paid time off during the concurrent PFL and FMLA period as permitted by the FMLA and the employer's FMLA policy. However, if the leave is *solely* PFL, employees may elect to utilize accrued but unused vacation, personal or applicable sick time to receive full salary, but employers may not require them to do so. Employers who pay full salary during PFL through use of PTO may request reimbursement from the insurer. The request must be filed *before* the carrier pays PFL benefits.

Earned Sick Time Act

Some of the reasons for PFL overlap with permitted uses of sick leave under New York City's Earned Sick Time Act. However, except as set forth above, employers cannot mandate that employees take sick leave and PFL concurrently. Rather employees may elect to use sick leave to receive full pay during their PFL, as applicable.

Employer Leave Policies

Many employers also have existing paid leave policies that overlap with the covered reasons for PFL (e.g., paid parental leave or paid FMLA). Though the law and regulations are unclear on this point, it appears that employers may not mandate that these forms of leave run concurrently with PFL (except as permitted in conjunction with a concurrent FMLA leave). Hopefully further guidance will clarify this issue; however, as we near the January 1 effective date employers may need to consider revising their paid leave policies so that they function as a supplement to PFL leave to avoid employee attempts to "stack" PFL on top of the employer's existing leave policies.

State Disability Leave

Although employees may not use PFL for their own disability, PFL nonetheless may impact an employee's entitlement to state disability leave. Specifically, the combination of PFL and disability leave may not exceed 26 weeks in the same 52-consecutive calendar week period (the current maximum for state disability benefits). Therefore, an employee who utilizes his or her full 8-week entitlement to PFL in the beginning of 2018 may only utilize 18 weeks of state disability leave during that same, 52-week period.

Can Employees Waive Their Rights to PFL?

Generally, no. However, employees *must* be given the option to waive PFL benefits and contributions in two situations: (1) when a full-time employee (as defined above) will not work 26 consecutive weeks (e.g., seasonal employees) or (2) when a part-time employee (as defined above) will not work 175 days in a 52-consecutive week period. The employee has the choice whether to waive PFL deductions and benefits; the employer cannot force them to do so. If the employee waives PFL, the employer must retain a copy of the fully executed waiver for as long as the employee remains employed. The regulations do not, however, provide guidance about what information must be included in this waiver or provided to the employee for the waiver to be valid. The Board has stated that it will develop a waiver form, but has not issued one at this time.

If these employees decide not to enter into a waiver, they will be required to make PFL

contributions for the duration of their employment and will be able to receive PFL benefits if they become eligible. For example, a per diem worker who may not work 175 days until 80 weeks of employment may elect not to waive his or her PFL benefits and can then utilize PFL once s/he becomes eligible on the 175th day worked.

If an employee's schedule changes so the employee will work for 26 consecutive weeks (full-time) or 175 days in a 52-consecutive week period (part-time), the waiver must be deemed revoked. Within 8 weeks of the change, the employer must notify the employee of the revocation and begin making deductions for PFL, including any retroactive amount due from date of hire.

What About Employees Subject to CBAs?

The regulations lack some clarity in terms of the interaction between PFL and collective bargaining agreements, but employers are not required to provide employees covered by a CBA with PFL coverage if (1) the CBA provides paid family leave benefits at least as favorable as the PFL legislation in terms of benefit rate, benefit duration, and eligibility (including lack of waiting period for benefits when eligible) and (2) the employee does not waive his or her right to paid family leave or otherwise opt-out of the law - unless s/he satisfies the waiver criteria set forth above. Outside of the requirements set forth in this paragraph, the CBA may provide rules for paid family leave that differ from the requirements of the PFL law. If the CBA does not set forth different rules, the PFL legislative provisions will apply.

Next Steps?

Given the foregoing, employers should consider the following:

- Employers should work with their disability insurance providers now to ensure they have appropriate coverage come January 1, 2018 and to determine the appropriate premium so that the employer can consider taking deductions.

- Self-insured employers have certain obligations under the PFL legislation, including electing by September 30, 2017 whether to self-insure for PFL or to seek coverage elsewhere.

- If the employer wants to begin taking deductions at this time, it may (but is not required to) do so. Although the statute does not require the employer to provide notice of the deductions, it may be best practice to inform the employees in advance of the deduction and its purpose.

- If any employees are eligible for the statutory waiver (as described above), the employer must provide them with the option to file a waiver before taking such deductions.

- Employers should also begin the process of reviewing and amending their handbooks and other written policies to include a Paid Family Leave policy. Given that PFL overlaps with other forms of leave, including FMLA leave and, for employers with workers in NYC, leave under the Earned Sick Time Act, employers should have a system in place to adequately track employee leave entitlements and usage, and should clarify their written policies

about how these various forms of leave interact.

- Employers with a unionized workforce should consider what obligations they may have under their applicable Collective Bargaining Agreements related to PFL.

If you have any questions about preparing for Paid Family Leave, please contact Tina Grimshaw at (212) 758-7792 or any other attorney at the Firm.