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NEW YORK PAID FAMILY LEAVE BENEFITS LAW

The New York Paid Family Leave (PFL) Benefits Law is effective January 1, 2018; however, it will take four years until fully implemented.

Applies To: Employers—all New York private sector employers regardless of size and regardless of whether the plan is fully-insured or self-insured.

The law provides ultimately up to 12 weeks of job-protected PFL in a 52-week period for:

- Providing care for a family member with a serious health condition,
- Bonding leave: after giving birth, adoption or foster care within the first 12 months, or
- Qualifying military leave event.

Additionally, health benefits must be maintained during the leave, and employees who contribute to the cost of health insurance must continue to pay their portion.

Starting in 2018, PFL becomes a mandatory benefit in New York providing:

- Paid time off (partial salary replacement)
- Job security
- Health benefits (must be maintained during the leave)

Although, employees cannot collect monetary benefits while out on Paid time off (PTO) or while using vacation days, the job protection aspect is not impacted.

Definition of Job Protection: Employees returning from PFL must be provided the same or comparable job. This applies even to those employers with less than 50 employees (those not subject to FMLA).

Benefit is Paid for by Employees: Payroll deductions must begin on or after July 1, 2017 in order to fund for qualifying events that occurred prior to January 1, 2018. PFL will be included under the disability policy all New York employers must carry.

DEFINITION OF ELIGIBLE EMPLOYEES

Full-Time Employees: Employees who work 20 or more hours a week are eligible for PFL after 26 consecutive weeks of employment regardless of the number of days worked per week.

Part-Time Employees: Employees who work less than 20 hours per week will become eligible for PFL after working 175 days.

Those who are in jobs that will not allow you to attain 26 continuous weeks or 175 days, (i.e., seasonal workers) have the option to file a waiver of PFL benefits, exempting the employee from the obligation to make contributions.

EMPLOYEE CONTRIBUTIONS AND BENEFITS

Full-Time Employees: Eligible to receive up to 12 weeks of PFL (when fully implemented).

Part-Time Employees: Eligible to receive pro-rata portion of PFL.

PFL benefit amounts will be based on a percentage of an employee's weekly wage up to a cap based on the New York State Average Weekly Wage (NYSAWW)—the maximum employee contribution will be based on a similar capped percentage.

Employee Deductions

On June 1, 2017, the New York State Department of Financial Services (NYDFS) issued a statement setting forth the maximum employee contribution rate, beginning January 1, 2018.

Employees will pay a maximum contribution of 0.126% of their weekly wage not to exceed the NYSAWW (currently \$1,305.92). At this time, the maximum weekly rate is \$1.65 per week. Moving forward, the NYDFS will set the maximum employee contribution on or before September 1 of each year.

In the absence of any additional guidance—PFL is paid post-tax as it doesn't fit into Section 125 guidelines for pre-tax deductions.

Progression of Leave Benefit

Year	Maximum Benefit Length in Any Given 52-week Period	Percentage of Employee Weekly Wage	Maximum Amount on Concurrent NYSAWW of \$1,305.92*
2018	8 weeks	50%	\$652.96
2019	10 weeks	55%	\$718.26
2020	10 weeks	60%	\$783.55
2021	12 weeks	67%	\$874.97

The percentage of an employee's average weekly wage is calculated based on 8 weeks prior to leave or the State Average Weekly Wage rate, whichever is less.

An employer's failure to withhold may not be recovered by withholding larger than the maximum employee contribution at a later date.

**subject to change annually on 3/31*

QUALIFYING EVENTS

Maternity and Paternity Leave

PFL begins after the birth of a child and is not available for prenatal conditions. Leave may be taken during the first 12 months following the birth, adoption or fostering of a child by either parent for bonding with the child. Therefore, beginning January 1, 2018, babies born in 2017 will be an eligible qualifying event.

Interplay between PFL and the NY Disability Benefit Law (DBL): Maternity leave can be complicated due to the baby bonding in addition to one's own disability. A mother-to-be can go out on DBL weeks prior to her due date. Upon birth, the mother can decide to continue a DBL claim or begin a PFL claim for baby bonding. If the mother has complications (including postpartum depression) and has moved to PFL, she can go back on DBL. But DBL cannot be taken together and cannot exceed 26 weeks total within the consecutive 52-week period beginning on the DOB.

Leave is limited to a total of 26 weeks in a 52-week period for both PFL and NY DBL. Entitlement to both are dependent upon each other, therefore tracking of time taken for each is critical to minimize overpayment.

Caring for a “Close Relative” with a “Serious Health Condition”

Close Relative

- Spouse
- Domestic Partner
- Child
- Child of Domestic Partner
- Parent
- Stepparent
- Parent-in-law
- Grandparent
- Adopted Child
- Grandchild
- Foster Child

Serious Health Condition

An illness, injury, impairment or physical or mental condition that involves:

- Inpatient care in a hospital, hospice, or residential health care facility; or
- Continuing treatment or continuing supervision by a health care provider.

What does not qualify as a serious health condition under PFL?

- Routine examinations which are not considered treatment
- A regimen or treatment that can be, and is, initiated without a visit to a health care provider, such as taking of over-the-counter medications (e.g., aspirin, antihistamines, or salves), bedrest, drinking fluids, exercise, etc.
- The common cold, flu, earaches, upset stomach, minor ulcers, headaches other than medically diagnosed migraine, routine dental or orthodontia problems, periodontal disease, etc. (unless complications arise)
- Cosmetic treatments, such as most treatments for acne or plastic surgery

Active Duty Deployment

When a spouse, child, domestic partner or parent of the employee is on active duty or has been notified of an impending call or order of active duty.

EMPLOYEE REQUIREMENTS

Leave Notification

If a qualifying event is foreseeable, the employee must provide the employer with at least 30 days' notice. Failure to do so permits the employer or insurance carrier to file a partial denial of the family leave claim for a period of up to 30 days from the date the notice is provided by the employee.

If unforeseeable, the employee must provide notice as soon as practicable.

Request for PFL

Complete a PFL claim form. Proposed, sample forms have been recently released. PFL claim will likely be verified following a process similar to DBL. Documentation in support of the leave request is required.

Within 18 days of filing a complete claim for benefits, the PFL insurance carrier, (or the employer that self-insures) must pay or deny the claim and provide an explanation of the denial.

Employees may be paid by check, direct deposit or debit card. Not every carrier will offer all three, but the carrier must pay by check if the claimant requests this on his / her Request for PFL form.

If an employee and his/her spouse have different employers, both are eligible to take PFL at the same time. However, if the couple works for the same employer, the employer may deny the request for simultaneous PFL to care for the same family leave recipient, or to bond with a child.

Employees receiving partial Workers Compensation benefits may qualify for PFL provided they are working.

Disputes

Arbitration process established by the Workers' Compensation Board.

EMPLOYER REQUIREMENTS

An out-of-state employer has to provide PFL for NY based employees.

The employer must maintain health benefits during the leave; although if the employee fails to pay their contribution, benefits may be terminated. Upon return to work, health benefits must be reinstated.

Notice Requirements:

1. Post Notice (model notice forthcoming)
 - The notice must be displayed in plain view where all employees and/or applicants can readily see it.
2. Employee Handbook must be updated to explain rights and obligations and how to file a PFL claim.
3. If there is no Employee Handbook, written materials, or leave policies, the employer must provide written guidance to each of their employees concerning all of the employee's rights and obligations under PFL, including information on how to file a claim for paid family leave.

Regardless of whether the employer has updated its policy or has paid additional premiums to include PFL coverage in its disability benefits, every employee covered by their employer's statutory disability benefits policy will be provided PFL coverage as of January 1, 2018.

Employer must set up payroll to make applicable withholdings. The PFL rate is based on each employee's wage/salary, which may add to the complexity of payroll tracking/administration.

Employers should identify solutions on how to help minimize the added burden. Since paid leave can be taken in daily increments/intermittent intervals (such as every other Monday), absence management may become more complex. Employers who are not subject to FMLA may find this particularly challenging, as FMLA already requires granular absence management opportunities.

Determine Policy

Employers may offer employees the option to use sick or vacation leave for full pay, but they are prohibited from requiring employees to use this leave unless approved PFL leave is running concurrently with FMLA and the organization has a policy which forces the use of vacation or other PTO with FMLA.

Employers may not discriminate against employees for taking PFL.

When an employee seeks leave for the first time for a qualifying event, the employee need not expressly assert rights under PFL or even mention family leave. In all cases, the employer should seek further information from the employee to determine whether PFL is being sought by the employee.

Employers are required to provide 30 days' notice of request for PFL to the carrier (if known).

An employer may deduct employee contributions prior to the effective date of the policy and prior to an employee's eligibility for PFL.

An employer shall use their employees' contributions to provide PFL benefits to employees and must promptly return to employees any surplus in employee contributions that exceed the annual premium.

A covered employer that closes or dissolves its business and no longer has any employees may discontinue PFL on the date the business closes or is dissolved with no employees.

An employee who is out of work due to the closing or dissolution of the employer's business is not eligible for PFL as of the date of their termination.

An employee whose employer has changed pursuant to subdivision (4) of section 202 of the Workers' Compensation Law shall be eligible for family leave benefits if he or she was eligible under the previous covered employer.

An employer may be audited for any purpose related to the administration of PFL, including but not limited to claim filing, dates of leave, return to work, payroll information, and written guidance to employees concerning employee benefits or leave rights, employer use of employee contributions to provide PFL, and employer compliance with posting requirements.

Every carrier that provides statutory disability benefits policies in New York State is required to offer PFL coverage. Carriers have until July 31 to notify the state if they will continue to issue DBL/PFL.

FINES

Employer fines

Failure to provide coverage will result in a fine of up to .5% of weekly payroll for the period without coverage, plus an additional sum of up to \$500.

If an employer does not continue health coverage for an employee while on family leave, the employer will be responsible for medical costs incurred by the employee during the leave. When an employer fails to collect their employees' contributions to provide PFL coverage to

their employees and fails to provide coverage by purchase of an insurance policy or self-insuring, such employer shall be fully and directly liable to each of their employees for the payment of family leave benefits and waives their employees' contributions for the period(s) where no PFL coverage was provided.

When a covered employer collects their employees' contributions to provide PFL coverage and fails to use such contributions to purchase coverage, such employer shall refund all contributions collected but not used to pay premium for PFL.

Source: wcb.ny.gov/PFL/pfl-regs.jsp

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