

SEPTEMBER 21, 2016

San Francisco Amends Paid Parental Leave Law to Adapt to State Law Changes and to Clarify Requirements

BY MICHELLE BARRETT-FALCONER AND SEBASTIAN CHILCO

On September 14, 2016, San Francisco amended its Paid Parental Leave Ordinance (PPLO). The law will go into effect on January 1, 2017 for employers with 50 or more employees.¹ The law requires private employers to provide supplemental compensation to employees who use California paid family leave (PFL) benefits for new child bonding. The amendments both respond to changes the California Legislature made to the PFL benefits program and attempt to clarify an employer's PPLO supplemental compensation obligations.

Amount of Supplemental Compensation that Must Be Provided

For California PFL claims beginning on or after January 1, 2016, the maximum weekly state benefit is \$1,129 (55% of weekly wages for an employee with an annual salary of \$106,647.32). For claims beginning on or after January 1, 2018, the maximum weekly benefit increases to either 60% of weekly wages for higher-income workers or 70% of weekly wages for lower-income workers. The amendments to the PPLO acknowledge that these PFL changes will eventually decrease PPLO supplemental compensation obligations.

Determining Coverage and Pay for Employees Whose Hours Fluctuate

Along with other requirements, to be covered by the PPLO, an employee must perform at least eight hours of work per week for an employer in San Francisco, and at least 40% of the employee's total weekly hours for the employer must be worked in San Francisco. To determine if an employee

¹ To read about the law as originally enacted, see Michelle Barrett-Falconer and Sebastian Chilco, *Bonding by the Bay: San Francisco Mandates Paid Parental Leave*, Littler Insight (Apr. 21, 2016). Employers with 35 or more employees must comply with the ordinance on July 1, 2017; employers with 20 or more employees must comply beginning January 1, 2018.

whose hours fluctuate from week to week meets these thresholds, the amendments change the potential look-back period and impact how such employees' normal gross weekly wages must be calculated. Generally, a three-month look-back period is used (3 monthly, 6 biweekly or semi-monthly, or 12 weekly pay periods immediately preceding California PFL beginning).

Now, if an employee was on paid or unpaid leave during a pay period, that period is excluded from the analysis and the preceding period in which paid or unpaid leave was not taken is included to determine coverage, and any pay period in which the employee is on unpaid or partially paid leave is excluded and the preceding period in which unpaid or partially paid leave was not taken is included for purposes of calculating the employee's normal gross wages. As originally adopted, only pay periods in which unpaid leave was taken were excluded for both coverage and the calculation of the normal gross weekly wage.

Employee Notice Requirements

Originally, to receive PPLO supplemental compensation, an employee with multiple employers had to provide each employer with a copy of the employee's Notice of Computation of California PFL Benefits or other legally authorized statement, and information concerning wages received from all employers in the 90 days before the leave period. The amendments remove the first requirement.

Additionally, as a precondition to receiving PPLO supplemental compensation, a covered employee is required to either provide his or her employer a copy of the employee's Notice of Computation of California PFL Benefits or other legally authorized statement, or provide written authorization for the state to disclose the weekly benefit amount to the employer. The amendments specify that to use the second option, the employee must provide an authorization when applying for California PFL so the employer can request and obtain the information from the state.

The amended notice requirement language articulates the reality that employees may not always receive California PFL benefits at the same time they are actually taking new child bonding leave. Such delays in benefits receipt can be due to an employee's late, incomplete, or otherwise delayed benefits application; inquiries made by the state about the employee's application; or slow claims processing. Regardless of the reason for the delayed benefits receipt, it is now clear that an employer's obligation to provide PPLO supplemental compensation will not occur until the employer has the California PFL weekly benefit information that the covered employee must provide or authorize the state to disclose. This recognition is important to employers grappling with policy and process administration questions about when, and how much, to pay in PPLO supplemental compensation while an employee is on leave when the amount of California PFL benefits being provided is unknown.

Anti-Retaliation Provisions

Pre-amendments, reducing a covered employee's wages within 90 days of the employee's requesting or applying for California PFL created a rebuttable presumption that the decrease was made to reduce an employer's PPLO supplemental compensation obligation. As amended, the presumption applies within 90 days of an employee's notifying an employer of the employee's intent to apply for and/or use California PFL. As such, the period during which wages may not be reduced could be significantly expanded if the employee gives notice well before applying for and/or using state benefits.

Post-Termination Supplemental Compensation Obligation

The original PPLO provided that, even if an employee separated from employment, an employer's supplemental compensation obligations continued for the remainder of the California PFL period. The amendments clarify that the obligation continues only for the remainder of the period in which the employee actually receives California PFL benefits. This distinction is important because an employee may opt to not take all California PFL benefits at once. Accordingly, the original law could have been interpreted to require employers to provide supplemental compensation to separated employees in potential future California PFL periods within the 12-month period though the employee did not receive, or even apply for, benefits until after employment ended.

The Amendments' Impact

Though a handful of changes occurred as a result of the amendments, the two biggest highlights are San Francisco recognizing: 1) what the state has done to increase how much money will come from the state's PFL coffers; and 2) that California PFL benefits – and receipt thereof – might be delayed so state benefits may not come to an employee during the leave itself. The latter is important because employers have struggled with figuring out how much San Francisco PPLO supplemental compensation they will be required to supply and when to do so. The amendments recognize this, and should supply employers with time to actually know how much the state provides in PFL benefits (or if such benefits are even provided) to an employee and time to then determine how much in supplemental compensation they should supply.

Employers should plan ahead by developing a policy addressing San Francisco PPLO supplemental compensation. If an employer already has a benefits policy in place providing some type of income replacement for new child bonding leave, that employer should work to integrate any PPLO supplemental compensation requirement with existing policies to avoid unintended conflicts and/or errors benefits or payroll administration. Human Resources, Payroll, Leave and Benefits personnel should also be trained in how to administer the policy.