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New York Proposes Regulations on New Paid Family Leave Law

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Last year, New York Governor Andrew Cuomo signed the [New York Paid Family Leave Benefits Law](#) (“PFLBL”).¹ This law will provide eligible employees up to 12 weeks of paid family leave, to be funded through a payroll tax on full-time and part-time employees, to care for an infant or for a family member with a serious health condition, or to assist with family obligations when a family member is called into active military service.² On February 22, 2017, the State of New York filed its proposed regulations implementing the PFLBL, which do not become effective until after the 45-day notice-and-comment period, or until April 8, 2017. This article discusses certain aspects of the proposed regulations.³

Leave Entitlement for Full-Time and Part-Time Employees

The proposed regulations clarify that both full-time and part-time employees are eligible for paid family leave benefits. Full-time employees become eligible after 26 consecutive weeks of work, and part-time workers become eligible on the 175th day of work, regardless of the number of hours they work per week and regardless of the number of employees employed by their employer.⁴ Thus, employees may be eligible for New York paid family leave benefits even if they are not eligible for leave under the federal Family Medical Leave Act (“FMLA”). Part-time employees are entitled to only a pro-rated percentage of the maximum paid family leave benefit available for full-time employees.⁵

1 New York State Budget, S. 6406-C, A. 9006-C (Apr. 4, 2016) at Part SS.

2 Notably, paid family leave is not available for an employee’s own serious health condition, although an employee may be eligible for income protection benefits under New York’s existing short-term disability insurance program. For more information on the new legislation, please see Stephen Fuchs and Bruce Millman, [Understanding New York’s New Paid Family Leave Law](#), Littler Insight (May 23, 2016).

3 The complete text of the proposed regulations can be found at: <http://www.wcb.ny.gov/PFL/pfl-regs-text.jsp#380-2>

4 12 NYCRR §380.2-5.

5 12 NYCRR §380.2-5(b).

Coordination with Other Leaves

Under the proposed regulations, employees who qualify for both FMLA leave and the new state paid family leave must use leave under both statutes concurrently. However, employees may not stack FMLA and PFLBL leave time to take more than 12 weeks of family medical leave, or receive paid leave in excess of the maximum duration of leave permitted at the time by the phase-in schedule.⁶ Unlike with FMLA leave, employees may not concurrently receive New York State disability benefits and paid family leave benefits or paid sick leave under the New York City Earned Sick Leave Act.⁷

Dispute Resolution

The new legislation authorized the promulgation of alternative dispute resolution procedures for claims arising under the PFLBL. The proposed regulations establish these procedures. If adopted, they will require any claim-related dispute under the PFLBL, including eligibility, benefit rate, and duration of paid leave, to be resolved through arbitration.⁸ The Chair of the Workers' Compensation Board will be charged with appointing and disqualifying arbitrators to resolve these disputes.⁹ Arbitrators will attempt to first resolve all disputes by desk arbitration, which means the arbitrator will decide the case based only on the parties' written submissions, without holding any hearings. However, if the arbitrator determines further development of the record is necessary, he or she may hold a hearing to gather oral testimony.¹⁰ All arbitration fees will have to be paid by the employer, and failure to pay such fees will result in waiver of all defenses.¹¹

Payroll Deduction to Finance the Paid Leave

Paid family leave benefits under the PFLBL will be financed by deductions from employee pay and will provide paid benefits for a leave period not covered by workers' compensation benefits, state disability benefits, or private disability insurance.¹² On June 1, 2017, the New York State Superintendent of Financial Services is scheduled to set the maximum employee contribution amount.¹³ One month later, on July 1, 2017, employers may begin collecting the weekly employee contribution for paid family leave – although employees can only start using this leave on January 1, 2018.¹⁴ Employers that (i) fail to collect employee contributions to provide family leave coverage and (ii) fail to provide coverage by purchase of an insurance policy or self-insurance, will be liable for the payment of family leave benefits.¹⁵ If an employer collects employee contributions but does not use those contributions to provide PFLBL coverage, the proposed regulations will, if adopted, require the employer to refund those contributions to employees.¹⁶

Employers must provide employees whose regular work schedule will render them ineligible for paid family leave (e.g., an employee who is scheduled to work fewer than 26 weeks or 175 days in a year) the option

6 12 NYCRR §380.2-5(f).

7 N.Y. W. Comp. L. 206.3(c).

8 12 NYCRR §380-9-1.

9 12 NYCRR §380-9-2.

10 See Proposed 12 NYCRR §§355.9(a)(6); 380-9-8 (noting such benefits or insurance may apply to the employee's own health condition, which is not covered by paid family leave benefits under PFLBL).

11 12 NYCRR §380.9.5

12 N.Y. W. Comp. L. § 209(3)(b).

13 *Id.*

14 12 NYCRR §380.2.4.

15 12 NYCRR §380.7.10(b).

16 12 NYCRR §380.7.10(e).

to file a waiver to exempt them from making contributions for PFLBL coverage.¹⁷ Employers may make deductions from the pay of employees who opt not to file such a waiver.¹⁸

If an employer hires an employee who (i) is ineligible for PFLBL benefits and (ii) enters into a waiver, the entered waiver shall be deemed revoked within eight weeks of a change to the employee's schedule that requires the employee to continue working for 26 weeks or 175 days in a year.¹⁹ After the employer notifies the employee that his or her waiver has been revoked, the employer should begin immediately taking contributions from the employee and shall make contributions for PFLBL coverage, including any retroactive amounts due from the employee's date of hire.²⁰ Given that an employee who enters into a waiver upon hire may become liable for retroactive contributions due to a change in his or her schedule, we recommend employers inform employees of this possibility before they enter into a waiver, and discourage any employee for whom such a change in work scheduled is reasonably anticipated from electing a waiver.

Health Insurance During Leave

Employers must continue health insurance coverage to employees during paid family leave, and employees must continue to pay their share of the health plan premiums during the leave, even if the rate changes during the leave.²¹ Employers may terminate health insurance coverage for employees who are more than 30 days late in paying their share of the premium.²² However, employers must mail a notice to those employees at least 15 days before their health insurance coverage is to be terminated.²³ Employees whose health insurance coverage lapsed during paid family leave, or employees who chose not to retain health insurance during the leave, shall have their health insurance coverage reinstated upon return to work.²⁴ These obligations are consistent with the FMLA.

Handbooks and Notice Posting

Under the proposed regulations, employers will be expected to update their employee handbooks to include written guidance on the PFLBL.²⁵ The written guidance must include all of the employee's rights and obligations under the PFLBL, including information on how to file a claim for paid family leave.²⁶ If an employer does not maintain an employee handbook, it is still required to provide written guidance to employees on the new paid family leave benefit.²⁷

Employers must also post a notice concerning the PFLBL in plain view where employees and applicants can readily see the notice.²⁸ The posted notice must be in a form prescribed by the Chair of the Workers' Compensation Board, who has not yet issued a form notice.²⁹ It is unclear whether the prescribed form for the notice posting will be sufficient to satisfy the "written guidance" requirement, discussed above.

¹⁷ 12 NYCRR §380.2.6(a).

¹⁸ 12 NYCRR §380.2.6(d).

¹⁹ 12 NYCRR §380.2.6(b).

²⁰ *Id.*

²¹ 12 NYCRR §§380.7.4(a); 380.7.4(c).

²² 12 NYCRR §380.7.4(d).

²³ *Id.*

²⁴ 12 NYCRR §§380.7.4(e); 380.7.4(f).

²⁵ 12 NYCRR §380.7.2(a)(1).

²⁶ 12 NYCRR §380.7-2(a)(2).

²⁷ *Id.*

²⁸ 12 NYCRR §380.7-2(e).

²⁹ *Id.*

Request Forms

The proposed regulations contemplate the Chair of the Workers' Compensation Board creating a Request for Paid Family Leave Form, identified as PFL-1, for employees to claim paid family leave benefits.³⁰ Employers may designate an alternative method to request paid leave benefits under the PFLBL, including a written request form different from PFL-1 (such as a form currently in use to request FMLA leave), an electronic portal, or by telephone.³¹ However, employees may always use a PFL-1 form to claim paid leave benefits, even if an employer designates another method to request leave.³²

Intermittent Leave

Under the PFLBL statute, it was unclear whether employees can take the paid family leave on an intermittent basis, such as taking leave in daily or weekly increments. Details regarding the use of intermittent leave are still lacking in the proposed regulations, but they at least indicate that employees may take leave in daily or weekly increments by describing how such daily and weekly increments are to be calculated.³³

Payment

Upon receipt of a claim for paid family leave benefits, the state fund, private carrier, or employer, if self-insured, will be required to ask employees to choose the method of payment of the paid family leave, which may include payment by debit card, direct deposit or check.³⁴

Birth or Adoption Prior to January 2018

If an eligible employee's child was born or placed for adoption or foster care before January 1, 2018, the employee may take paid family leave on or after January 1, 2018, during the first 12 months after the child's birth or placement.³⁵ For example, if an eligible employee gives birth to a child on December 1, 2017, that employee may take paid family leave during the first 11 months of 2018.

Union Considerations

The proposed regulations prohibit employers and unions from negotiating an absolute waiver of employee rights to paid family leave benefits under the PFLBL.³⁶ However, a collective bargaining agreement may provide rules that differ from the requirements of the PFLBL upon approval by the Chair of the Workers' Compensation Board.³⁷ The proposed regulations do not provide any guidance on which PFLBL rules a collective bargaining agreement may change and to what degree.

Penalties

Under the proposed regulations, an employer that fails to provide paid family leave under the PFLBL will be subject to a fine of up to .5% of the employer's weekly payroll, plus an additional sum of not more than

³⁰ 12 NYCRR §380.5.1.

³¹ *Id.*

³² *Id.*

³³ 12 NYCRR §§380.2-5(b); 380.3-1(a); 380.4-1(b).

³⁴ 12 NYCRR §§380.5.6; 380.5.8.

³⁵ 12 NYCRR §380-2.7.

³⁶ 12 NYCRR §380-2.9(b).

³⁷ 12 NYCRR §380-2.9(c).

\$500.³⁸ Employers that fail to collect employee contributions for paid family leave coverage will be liable for payments of family leave benefits, and will waive their right to collect employee contributions for the period in which contributions went uncollected.³⁹ Similarly, employers that fail to continue health insurance benefits to employees out on paid family leave will be liable for employee medical costs for those on leave.⁴⁰

Differences between the FMLA and the PFLBL

There are key differences between the FMLA and the PFLBL. The FMLA provides eligible employees with 12 weeks of unpaid family leave, and applies only to large employers that employ 50 or more employees. In contrast, the PFLBL provides paid family leave to eligible employees, and applies to every employer (i.e., those that employ one or more employees). The FMLA covers employees who have worked for a covered employer for 12 months and have worked 1,250 hours in the previous 12 months. Under the PFLBL, full-time employees become eligible after 26 consecutive weeks of work, and part-time workers become eligible on their 175th day of work. The FMLA provides unpaid leave for the serious health condition of an employee or the employee's family member. Unlike the FMLA, the PFLBL provides no leave benefits for an employee's own serious health condition. A more detailed discussion about the differences and similarities between the PFLBL and the FMLA can be found in Littler's prior Insight article on the PFLBL statute.⁴¹

Recommendations for Employers

While the PFLBL represents a major change in the law concerning family leave for New York employers, its substantive provisions do not take effect until January 1, 2018, giving employers the remainder of 2017 to prepare. Employers should take advantage of this lead time to communicate with their workers' compensation carriers regarding adding PFLBL benefits to their coverage, and to prepare their payroll function to add another deduction for family leave benefits. The maximum contribution rate will be set by the New York State Superintendent of Financial Services on or before June 1, 2017.⁴² Moreover, once the required form of notice is issued by the Chair of the Workers' Compensation Board, employers may post the notice to ensure it can be seen by employees before the law goes into effect on January 1, 2018. Employers should also consult experienced employment counsel to amend their paid time off, leaves of absence, and family and medical leave policies to comply with the new law.

38 12 NYCRR §380-710(a).

39 A Special Fund for Disability Benefits will be created as a carrier if a covered employer does not provide paid family leave coverage to its employees. The employer will be liable for the total value of paid family leave claims paid by the Special Disability Fund during the period of noncompliance, plus a penalty of one percent of the employer's payroll during the period of noncompliance. Proposed 12 NYCRR §380-710(f).

40 12 NYCRR §380.710(d).

41 See [Understanding New York's New Paid Family Leave Law](#), supra note 2.

42 N.Y. W. Comp. L. § 209(3)(b). The regulations do not specify how the maximum deduction rate will be published, but we expect this information will be published on the Superintendent of Financial Services' Webpage, located at www.dfs.ny.gov.