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## New York Issues Final Paid Family Leave Law Regulations

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The New York Paid Family Leave Benefits Law (“PFLBL”), passed last year and effective January 1, 2018, will provide eligible employees with a paid, job-protected leave of absence, starting at 8 weeks in 2018 and eventually reaching 12 weeks by 2021. Employees may use paid family leave to bond with a new child, to care for a family member with a serious health condition, or to assist with family obligations when a family member is called to active military service. The wage replacement benefits, with certain exceptions, will be funded through payroll deductions, cover 50% of the employee’s average weekly wage commencing in 2018, subject to a statutory cap, and reach 67% or the statutory cap by 2021.<sup>1</sup>

The New York Workers’ Compensation Board filed proposed regulations implementing the PFLBL in February 2017 (“proposed regulations”),<sup>2</sup> and, after a comment period, issued revised proposed regulations in May 2017. The final regulations implementing the PFLBL (“final regulations”) were adopted on July 19, 2017. This article discusses significant changes between the proposed regulations and the final regulations that are most pertinent to covered employers.

### Coverage of Full-Time and Part-Time Employees

Under the proposed and final regulations, 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 employees become eligible on the 175th day of work in a 52-consecutive-week period. Unlike the proposed regulations, the final regulations define

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1 See Stephen Fuchs and Bruce Millman, *Understanding New York’s Paid Family Leave Law*, Littler Insight (May 23, 2016).

2 The proposed regulations issued in February 2017 were discussed at length in a prior Littler Insight article. See Stephen Fuchs, Bruce Millman and Adam Roth, *New York Proposes Regulations on New Paid Family Leave Law*, Littler Insight (Mar. 20, 2017).

“full-time” employees as those working 20 or more hours per week, and “part-time” employees as those working fewer than 20 hours per week.<sup>3</sup>

The final regulations also address whether use of paid time off counts towards “consecutive weeks worked” or “days worked” for eligibility purposes. Specifically, to determine eligibility for benefits, using scheduled vacation time, personal, sick or other time away from work counts as consecutive work weeks or days worked if the contributions (that is, payroll deductions) for the cost of paid family leave benefits have been taken for such periods of time. However, periods of temporary disability leave may not be counted for eligibility purposes.<sup>4</sup>

### **Calculation of Average Daily Rate for Daily Leave**

The proposed and final regulations provide that employees may take intermittent paid family leave in daily or weekly increments, but the final regulations clarify the procedure for computing the rate for weekly leave and the average daily rate for daily leave. *Weekly* benefits are calculated using the employee’s average weekly wage for the eight-week period immediately preceding the first day of leave. When an employee takes intermittent leave, an employer may exclude the final partial week when calculating the employee’s average weekly wage. When an employee takes family leave in *daily* increments, the employee’s maximum period of family leave is calculated based on the employee’s average weekly wage divided by the average number of days worked per week. Thus, an employee who works three days per week in 2018 will receive the equivalent of three days per week (at 50% of their wages in 2018) for eight weeks, or a maximum of 24 days in any consecutive 52-week period.

### **Issues Regarding When FMLA Leave or Paid Time Off Can Be Counted Against Paid Family Leave**

The final regulations clarify when time off taken by an employee under the federal Family and Medical Leave Act (“FMLA”), an employer’s vacation or paid time off policies, or an employer’s private paid leave policies, can be counted against PFLBL paid family leave.

### ***Coordination with FMLA Leave***

First, while the PFLBL provides that leaves covered by both the FMLA and PFLBL run concurrently,<sup>5</sup> the final regulations require employers to (i) notify an eligible employee that his or her time off is designated as leave under both the PFLBL and the FMLA; and (ii) provide the employee with the notice and certification forms required under FMLA. If the employer fails to provide the required notice, the employer will waive the right to have the paid family leave run concurrently with FMLA leave.<sup>6</sup> If the employer provides notice to employees of eligibility for paid family leave benefits, and if PFLBL leave is also covered by the FMLA, but the employees decline to apply for paid family leave, then the employer and its carrier may count the leave against the employees’ paid family leave entitlement.<sup>7</sup> The final regulations also confirm that leave taken for an employee’s own serious health condition under FMLA may not be counted against his or her paid family

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3 12 NYC.R.R. §380-2.5(a), (b).

4 12 NYC.R.R. §380-2.5 (d), (e).

5 N.Y. Workers Comp. L. §206(4)

6 12 NYC.R.R. § 380-2.5(g)(1) (citing 29 C.F.R. §§ 825.301, 825.305); §380-2.5(g)(2).

7 12 NYC.R.R. § 380-2.5(g)(3).

leave entitlement.<sup>8</sup> An employer that designates paid family leave as FMLA leave may charge an employee's accrued paid time off in accordance with the provisions of the FMLA and the employer's FMLA policy.<sup>9</sup>

### **Coordination With Accrued Paid Time Off**

Under the PFLBL, an employer may allow employees to use accrued vacation, paid time off or other employer-provided paid parental leave in lieu of applying for paid family leave benefits, but, unlike when leave is designated under the FMLA, employers may not require employees to exhaust all paid time off when taking paid family leave.<sup>10</sup>

The final regulations provide clarity regarding the use of accrued paid time off for family leave benefits, and the ability of employers to seek reimbursement from their carriers for premiums paid for an employee who elects to use accrued paid time off for family leave in lieu of applying for paid family leave benefits. Under the final regulations, when an employer offers, and the eligible employee elects to charge all or part of his/her family leave time to unused paid time off and receives his or her full salary, the employer may request reimbursement from the carrier for family leave benefits by filing a claim for reimbursement prior to the carrier paying such benefits.<sup>11</sup>

### **Deductions from Employee Pay**

The Superintendent of Finance set the maximum permissible deduction from employee pay to finance paid family leave at 0.126% of the employees' weekly pay, capped at 0.126% of the state average weekly wage, which is \$1,305.92. Using these figures, the maximum weekly employee contribution rounded to the nearest cent is \$1.65 per week. These figures are to be adjusted annually by the Superintendent of Finance. Employers have been permitted, but not required, to take deductions from employee pay since July 1, 2017.<sup>12</sup>

### **Waivers Must be Offered to Ineligible Employees**

Employees who will not be eligible for paid family leave benefits because they are not scheduled to be employed for at least 26 consecutive weeks, or will not work 175 days in a 52-week period, may sign a waiver of benefits relieving them from making contributions for paid family leave benefits. The final regulations explicitly state that offering a waiver in these circumstances is mandatory. Waivers are deemed revoked within eight weeks of any change in the employee's schedule that requires the employee to continue working for 26 consecutive weeks or 175 days in a 52-week period. In such an event, the employee must make contributions, including any retroactive amount due from hire, as soon as the employee is notified by the employer of such obligation.<sup>13</sup>

### **Obligations Regarding Handbooks and Notice Posting**

The final regulations require employers to update their employee handbooks to include written guidance on the PFLBL. The written guidance must include all of the employee's rights and obligations under the

<sup>8</sup> 12 NYC.R.R. § 380-2.5(g)(4).

<sup>9</sup> 12 NYC.R.R. § 380-6.2(a)-(c). This provision, new to the final regulations, is significant in that it allows employers to charge an employee's accrued time off when it is concurrently designated as leave covered by the FMLA, whereas under the NYPFL an employee can only allow an employee to choose whether or not to use accrued paid time off in lieu of applying for paid family leave benefits.

<sup>10</sup> N.Y. Workers Comp. L. § 205(2)(c).

<sup>11</sup> 12 NYC.R.R. § 380-6.2(a).

<sup>12</sup> See N.Y. Workers Comp. L. 209(3)(b); *Decision on Premium Rate for Family Leave Benefits and Contribution for Coverage Beginning January 1, 2018*, New York State Department of Financial Services, June 1, 2017; 12 NYC.R.R. § 380-7.2(b)(1).

<sup>13</sup> 12 NYC.R.R. §380 - 2.6(a), (b).

PFLBL, including information on how to file a claim for paid family leave. If an employer maintains no employee handbook, the employer still must provide written guidance to employees on the new paid family leave benefit.<sup>14</sup>

The final regulations also require employers to post a notice concerning the PFLBL in plain view where employees and applicants can readily see the notice. The posted notice must be in a form prescribed by the Chair of the Workers' Compensation Board, who, to date, has not yet issued a form notice.<sup>15</sup>

## Recommendations

Employers have the remainder of 2017 to prepare for the leave and wage replacement benefit provisions of the PFLBL to take effect on January 1, 2018. If not already done, employers should communicate with the company's insurance carrier providing them state disability benefits coverage - whether a private carrier or the New York State Insurance Fund - to add paid family leave coverage. In addition, employers that are not currently taking deductions from employee pay for paid family leave coverage should prepare their payroll function to do so well before January 1, 2018, so that the employer has adequate funding to pay for the premiums to be charged by their carrier for paid family leave coverage. Employers should give notice to employees seven days before PFLBL deductions commence, and must provide employees who will not work 26 consecutive weeks or 175 days in a 52-week period with the option of signing a waiver of coverage for paid family leave benefits.

Employers must also prepare new handbook policies and guidance to be incorporated and circulated on or before January 1, 2018, advising employees of their rights and obligations under the PFLBL. Employers should further amend existing leave policies to incorporate paid family leave and explain the interaction between existing leave policies and PFLBL rights. A notice of employee rights and responsibilities under PFLBL (in a form to be issued by the Chair of the Workers' Compensation Board) must be posted in a conspicuous place on or before January 1, 2018. Employers should consult experienced employment counsel familiar with the specific requirements and nuances of the PFLBL to create a new paid family leave policy, amend their existing leave and paid time off policies to incorporate PFLBL, and otherwise ensure compliance with the detailed provisions of the PFLBL statute and final regulations.

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<sup>14</sup> 12 NYC.R.R. §380-7.2(a).

<sup>15</sup> 12 NYC.R.R. §380-7.2(e).