

Alert

New York Paid Family Leave Benefits Law to Take Effect

December 1, 2017

Effective Jan. 1, 2018, New York State's Paid Family Leave Benefits Law (the "PFLBL") will go into effect. The PFLBL will require nearly all employers with at least one employee in New York to provide job-protected paid family leave to their employees for up to eight weeks in 2018, increasing to 10 weeks in 2020 and to 12 weeks in 2021.

Overview of Benefits

To provide paid family leave benefits, most employers will add a paid family leave insurance policy to their existing short-term disability policy. The cost of the paid family leave premiums may be funded through deductions from employees' after-tax pay, with such deductions not to exceed the lesser of 0.126 percent of (i) the employee's weekly wage or (ii) the current New York State Average Weekly Wage, which is currently \$1,305.92. For 2018, the maximum deduction is \$1.65 per week.

In 2018, the maximum weekly benefit an employee is eligible to receive will be the lesser of 50 percent of (i) the employee's weekly wage or (ii) the New York State Average Weekly Wage, increasing to 55 percent in 2019, 60 percent in 2020 and 67 percent in 2021. For 2018, the maximum weekly benefit is \$652.96.

Employee Eligibility

Under the PFLBL, employees who have been employed full-time for 26 consecutive weeks or part-time (less than 20 hours per week) for 175 days are eligible for paid family leave for the following reasons:

- To bond with the employee's child during the first 12 months following the birth, adoption or fostering of the child.
- To care for a family member¹ with a serious health condition.²
- For family matters arising from an employee's spouse, child, domestic partner or parent being on active military duty.

The PFLBL does not provide paid leave benefits for an employee's own serious health condition. The amount of leave available to an employee is computed by reviewing the amount of leave taken by the

¹ Covered "family members" under the PFLBL include an employee's spouse, parent, child, domestic partner, parents-in-law, grandparent or grandchild.

² "Serious health condition" means 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."

employee over the 12 preceding months, as of the first date that paid family leave benefits begins. If an employee or an employee's spouse gave birth to or adopted/fostered a child in 2017, the employee will be eligible for eight weeks of paid family leave in 2018, even if the employee took paid or unpaid child care leave in 2017. Leave may be taken intermittently in full day increments.

Under the new law, employees will be subject to the same notice requirements for leave under the PFLBL as for leave under the federal Family and Medical Leave Act ("FMLA") (i.e., at least 30 days of prior notice in instances where the need for leave is foreseeable, or otherwise as soon as practicable).

Interaction With FMLA

Employers subject to the FMLA are permitted to require that paid family leave and FMLA leave run concurrently. To accomplish this, employers must notify an employee that leave will be counted against the employee's entitlements under both statutes concurrently.

Use of Unused Paid Time Off

Employers may not require employees to use accrued, unused paid time off benefits (including any paid parental or childcare leave) while receiving paid family leave benefits. If an employer has designated that paid family leave and FMLA leave will run concurrently, pursuant to the FMLA the employer may require the employee to use accrued, unused paid time off benefits while receiving paid family leave benefits.

If an employee is receiving full pay while on paid family leave, an employer may request reimbursement for any paid family leave benefits the employee receives during that time period.

Interaction With Short-Term Disability

An employee may not receive paid family leave benefits and short-term disability benefits for the same time period. As a result, an employee who gives birth to a child in 2018 would initially be entitled to six or eight weeks of short-term disability benefits for childbirth, followed by an additional eight weeks of paid family leave (which the employee can take at any time during the 12 months following the child's birth). Under the PFLBL, an employee is entitled to a maximum combined total of 26 weeks of short-term disability and paid family leave benefits during a consecutive 52-week period.

Health Benefits and Return From Leave

The new law requires employers to maintain an employee's health benefits during the employee's paid family leave and requires employees to continue contributing to the cost of health insurance premiums during that time. In addition, employers must reinstate employees to the same or comparable position upon returning from paid family leave.

Special Considerations for Unionized Employers

Employers with employees subject to a collective bargaining agreement are not required to provide paid family leave benefits to employees if the collective bargaining agreement provides paid family leave benefits at least as favorable as those required under the PFLBL.

It is possible that a unilateral decision to deduct paid family leave insurance premiums from an employee's wages without bargaining with the labor organization may violate the National Labor

Relations Act. As a result, it is unclear whether an employer may make payroll deductions to cover the cost of paid family benefits absent negotiations with the union concerning such deductions.

Special Considerations for Schools and Other Nonprofits

Schools and certain other nonprofit institutions are not required to provide short-term disability insurance coverage and paid family leave insurance coverage to certain categories of employees, but may elect to do so. An employer may voluntarily provide coverage to exempt employees (such as teachers), subject to approval of the Chair of New York State Workers' Compensation Board. If the employer intends to require employees to contribute to the cost of such coverage, the election will require the approval of a majority vote of employees who will be covered under the law. Employers who currently deduct from employees' pay for short-term disability benefits may deduct from employees' pay for paid family leave benefits without obtaining any additional approval.

Recommendations

The Workers' Compensation Board has released a form of notice that employers must provide to employees giving them notice of their rights under the PFLBL.³ Employers must also update their handbooks to include information regarding paid family leave. In addition, employers should review their current policies and procedures, such as paid sick leave or other paid time off, disability leave and FMLA leave policies, to ensure those policies work in conjunction with the PFLBL.

Employers should consult with their short-term disability insurance provider to determine the additional premiums required to be paid for coverage. In addition, employers should consult with their payroll service provider.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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³ <https://www.ny.gov/sites/ny.gov/files/atoms/files/1711-PFL-271SFormFill.pdf>