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SPECIAL ALERT ON DEVELOPMENTS IN

Employment Law

New York State's Paid Family Leave Law Takes Effect This Year

In 2016, Governor Cuomo signed legislation adopting what will eventually be a twelve-week paid family leave policy for New York employees (the "Paid Family Leave Law" or "Paid Family Leave"). Once fully implemented, the Paid Family Leave Law will provide New York employees with up to twelve weeks of Paid Family Leave for the purpose of (1) caring for a new child, (2) caring for a family member with a serious health condition, or (3) relieving family pressures when a family member, including a spouse, domestic partner, child or parent, is called to active military service.

The Paid Family Leave Law is an extension of New York's Disability Benefits Law, commonly referred to as short-term disability. Short-term disability policies are required to include Paid Family Leave Law coverage in the policy. Paid Family Leave Law compensation is now funded through employee contributions deducted from payroll.

Coverage must have taken effect January 1, 2018. The rate for coverage is .126% of employee earnings up to the cap of the current state average weekly wage of \$1,305.92, or \$1.65 as the maximum per week per employee for 2018.

Covered Employers

New York private employers that have employed one individual for thirty (30) consecutive days are covered by the Paid Family Leave Law. Thus, coverage is broader than the federal Family Medical Leave Act, which only covers employers with fifty (50) or more employees.

Eligible Employees

Paid Family Leave is available to New York employees who work for covered employers for twenty (20) hours or more per week for twenty-six (26) or more consecutive weeks of employment and to those who have worked on a part-time basis (fewer than twenty [20] hours per week) for one hundred seventy-five (175) days in a fifty-two (52) consecutive week period.

Waiver of Benefits

If an employee is scheduled to work less than twenty (20) hours per week, or is not expected to work twenty-six (26) consecutive weeks, the employer must provide the employee with an option to file a waiver of Paid Family Leave benefits. The employee may opt out of Paid Family Leave by completing the Waiver of Benefits Form, available at <https://www.ny.gov/new-york-state-paid-family-leave/paid-family-leave-forms-employees-employers-and-insurance-carriers#familymember>.

However, if an employee subsequently changes his or her work schedule so as to become eligible for Paid Family Leave benefits, then any waiver filed will be deemed revoked within eight (8) weeks of that change.

Regulations provide that an employee whose waiver has been revoked is then obligated to begin making contributions to the cost of family leave benefits, including any retroactive amounts due from the date of hire as soon as the employee is notified by the employer of the obligation.

Qualifying Events

Paid Family Leave is available for any of three reasons:

- Employees can take Paid Family Leave to care for a close relative with a serious health condition. “Close relatives” are defined as spouses, domestic partners, children, parents, parents-in-law, grandparents, and grandchildren. A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves either (a) in-patient care, or (b) continuing treatment or continuing supervision by a health care provider.
- Employees may also use Paid Family Leave to bond with the employee’s newborn, newly-adopted, or newly-placed child within the first twelve (12) months after childbirth, adoption or placement of an adopted or foster child. Employees may not take Paid Family Leave for their own pre-natal conditions.
- Employees may also take Paid Family Leave for when their spouse, child, domestic partner or parent is on military active duty or has been notified of an impending call or order to active duty. Paid Family Leave may not be used for an employee’s own serious health condition or qualifying military event.

Requests for Paid Family Leave

When the Paid Family Leave is foreseeable and based on an expected birth, adoption placement or other qualifying event, the employee must provide the employer with thirty (30) days’ notice in advance of the date on which the leave is to begin. If the need for leave is not foreseeable, the employee must provide notice as soon as practicable.

New York has published a “Request for Paid Family Leave Form (PFL-1),” available at the link provided above.

If an employee requests intermittent leave, he or she must submit a schedule for the leave to the self-insured employer or carrier. Benefits under the Paid Family Leave Law may be withheld pending a formal submission of his or her request and certification together with dates of the leave.

Paid Family Leave Benefits

Paid Family Leave benefits began on January 1, 2018 in an amount equal to at least fifty percent (50%) of the employee’s average weekly wage, or fifty percent (50%) of the State average weekly wage, whichever is less, for a period of up to eight (8) weeks. Benefits will increase on January 1 of each year, concluding with the final increase on January 1, 2021.

The schedule for the increases is as follows:

Starting	Weeks Available	Maximum % of Employee’s Average Weekly Wage	Maximum % of State Average Weekly Wage
January 1, 2018	8	50	50
January 1, 2019	10	55	55
January 1, 2020	10	60	60
January 1, 2021	12	67	67

Coordinating New York Paid Family Leave with Other Leave Laws and Policies

Employees may not use Paid Family Leave while they are collecting Workers’ Compensation benefits and are not working.

Leave under the Paid Family Leave Law runs concurrently with any leave available under the FMLA. However, the employer must provide a notice to the employee and the certification forms required under the FMLA in order to require this to happen.

If an employer covered by the FMLA designates a period of family leave under the Paid Family Leave Law as concurrent under the FMLA, it may charge an employee's accrued paid time off in accordance with the provisions of the FMLA. But if leave under the Paid Family Leave Law is not designated to run concurrently with FMLA – whether because the employer is not covered by the FMLA or the employee does not otherwise meet the FMLA's eligibility requirements – then an employee may choose, but may not be required, to charge available paid time off to leave under the Paid Family Leave Law in order to receive full salary during the leave.

With respect to the New York City Earned Sick Time Act, the Paid Family Leave regulations provide that “if the rules governing an employee's use of sick time allow them to use accrued time off to care for a seriously ill family member, such time falls within the regulations,” and an employee may elect to use such paid sick time concurrently with Paid Family Leave and receive 100% of his or her salary during that period. The New York City Earned Sick Time Act does allow for paid time off for a seriously ill family member as well as an employee's own illness. However, leave for an employee's own illness does not qualify as Paid Family Leave, and the employee would be precluded from receiving both Paid Family Leave benefits and sick pay for the employee's own illness during the same period.

Although New York's Paid Family Leave Law does not provide benefits to employees who wish to take leave for their own serious health condition, employees may still be entitled to New York State's Short Term Disability Leave Program and they may be eligible for unpaid leave under the FMLA.

If employees elect to use accrued vacation as part of their Paid Family Leave and receive full salary, the employer may request reimbursement out of any Paid Family Leave benefits due or to become due by filing a claim for reimbursement with the carrier prior to the carrier's payment of the Paid Family Leave benefits. The actual reimbursement amount may be computed after the leave is complete.

Health Insurance

Employers must continue to provide an employee with their existing health insurance benefits for the duration of the leave. Employees must continue to pay their portion of the premium cost to maintain coverage.

Job Protection

Similar to leave taken under the FMLA, Paid Family Leave is job protected, meaning that upon returning from Paid Family Leave, an employee is entitled to reinstatement to his/her prior position, or to a comparable position with comparable pay, benefits, and other terms and conditions of employment.

Payroll Deductions and Employer Obligations

New York Paid Family Leave is financed by employee contributions deducted from wages. This was effective as early as July 1, 2017. Employers can choose to finance the obligations themselves, but only employers that self-insure their disability benefits may self-insure Paid Family Leave benefits.

New York State Department of Financial Services has established that the maximum employee contribution is .126% of an employee's weekly wage up to, and not to exceed, the statewide average weekly wage, which currently amounts to \$1.65 each week.

Employers must purchase Paid Family Leave insurance coverage from their New York disability benefits carrier, or arrange for self-insurance, which took effect beginning January 1, 2018. Employers should have determined whether or not to withhold premiums from employee paychecks prior to that date in order to be able to properly fund the policy to be effective as of the beginning of the year.

Employers should contact their payroll vendors to be ready to make the appropriate deduction from employees' paychecks starting when needed.

Employers are required to update employee handbooks and written policies as necessary to account for Paid Family Leave and its

relationship with its other policies.

Upon securing Paid Family Leave insurance or Board-approved self-insurance, employers must obtain PFL-120 from their insurance carrier or licensed agent and display the form in a conspicuous location, similar to what they do for Workers' Compensation and Disability Insurance.

Finally, employers must provide the Employee Statement of Rights (Form PFL-271s), available at the link provided above, to employees when they take Paid Family Leave or take time off from work for a Paid Family Leave qualifying event, but have not requested Paid Family Leave. Employers may also provide this form to all employees to educate them about Paid Family Leave.

Self-Insurance

Employers may meet their obligations under the Paid Family Leave Law by providing coverage to employees in one or more of the following ways: (a) by securing a policy with any licensed insurance company authorized to write disability benefits insurance; (b) by purchasing a policy from the State Insurance Fund; (c) by participating in and contributing to a plan of an association, union or trustees authorized by the Chair of the Workers' Compensation Board; or (d) by securing the Chair's approval to self-insure by furnishing proof of financial ability to pay benefits and by depositing securities or posting bonds as a guarantee of performance.

Any employer who insures their disability coverage must purchase Paid Family Leave coverage from the same carrier and waive their right to self-insure. It is not clear yet if stand-alone Paid Family Leave policies will be available for employers that self-insure disability benefits.

The amount of securities, cash or other sum of surety bond which a self-insurer is required to deposit will be determined by the Chair.

No employee can be required to contribute more than the maximum employee contribution rate allowed by law as published by the Department of Financial Services.

Each self-insurer, and each employer, is now required to file annual reports with the Chair reporting the number of eligible employees, the amount of covered payrolls, the number of employees who receive benefits, the amount of benefits paid, the amount of employee contributions, and an estimate of amount of employee contributions in the ensuing year.

Any self-insured plan must use third-party administrators that are licensed by the Workers' Compensation Board.

An election to self-insure for Paid Family Leave benefits must occur no later than September 30, 2017.

Arbitration

Any disputes regarding a claim for New York Paid Family Leave, including those involving eligibility, benefit rate and duration of leave, is subject to arbitration.

Please contact Lipsitz Green Scime Cambria if you have any questions.