A New Headache - New York’s Paid Family Leave

Barbara E. Hoey

November 9, 2017

With the end of the calendar year in sight, employers must shift focus to ensure compliance with the New York State’s new Paid Family Leave (“PFL”) law, which goes into effect on January 1, 2018.

The Good News – The PFL, which applies to **all employers** (of any size) **does not** require employers to pay salary during a family leave. Generally, employees on family leave will get limited salary coverage paid through an employer’s insurance policy, much like the current State Disability benefits program.

The Bad News – The law now gives employees some salary continuation during certain FMLA – leave periods (including leave to care for a family member), which prior to this law were usually **unpaid** leaves. As many employers know, FMLA leave is a very popular benefit, even when it is unpaid. Family leave will most surely become an even more popular benefit, now that some salary will be covered.

COVERAGE

What Employers Are Covered? The new PFL law applies to any employer, of any size, **including** out-of-state employers who have employees working in New York State. The State intends for the PFL program to provide benefits to any eligible employee who works in New York, regardless of the employer’s headquarters or the employee’s place of residence.

What Employees Are Covered? Any employee who regularly works **20 or more hours per week** and has worked at least **26 consecutive work weeks**, preceding the first day of their PFL leave, is eligible for the PFL benefits. Employees who work fewer than 20 hours per week will be eligible for PFL benefits after working 175 “working days” (not calendar days) in their position.

ELIGIBLE REASONS TO TAKE LEAVE

Employees may take leave and receive PFL benefits in the following three situations:

1. To provide care for the serious health condition of a family member;
2. To bond with a new child during the first 12 months after birth or adoption;
3. For any reason that qualifies for leave under the FMLA relating to the military duty of a spouse, domestic partner, child, or parent, who is on active duty or has been notified “of an impending call or order to active duty.

In order to receive PFL benefits, employees will need to submit a formal Request for Paid Family Leave either in a format determined by the Chair of the WCB, or in another format to be determined by the applicable plan administrator.

NOTICE

Employers must provide written guidance to their employees regarding PFL benefits, laying out employee rights and obligations under the law and how to file a claim for PFL benefits.

- If you have a handbook, put it in the handbook.
- If you don't have a handbook, you must create a PFL notice or poster.
- Our advice – **do both.**

BENEFITS

Salary Continuation – PFL benefits will provide employees with a reduced level of salary continuation for the duration of the PFL leave period. Accordingly, PFL benefits will be provided on an increasing sliding scale beginning on January 1, 2018, pursuant to the following schedule: • January 1, 2018: **8 weeks of paid leave** at **50%** of the employee's average weekly wage, capped at 50% of the state average weekly wage; • January 1, 2019: **10 weeks of paid leave** at **55%** of the employee's average weekly wage, capped at 55% of the state average weekly wage; • January 1, 2020: **10 weeks of paid leave** at **60%** of the employee's average weekly wage, capped at 60% of the state average weekly wage; • January 1, 2021: **12 weeks of paid leave** at **67%** of the employee's average weekly wage, capped at 67% of the state average weekly wage. Employees may not receive short-term disability payments and PFL payments for the same period of time.

Health Insurance – Notably, employees taking leave under the PFL are also entitled to healthcare insurance continuation, under the same terms as if the employee continued to work during the leave period. This includes the employer's prerogative to require the employee to make his her normal health insurance contributions, if any, during the leave period. Employees cannot lose any employment benefit accrued prior to the date their PFL leave commenced. Employees are also entitled to reinstatement upon return from leave, either to his or her prior position, or to a comparable position with comparable benefits, pay, and other terms and conditions of employment. As with all employment legislation, employers cannot discriminate or retaliate against employees for taking leave under the PFL.

RELATIONSHIP WITH FMLA AND PAID TIME OFF

In situations where an employee's request qualifies for leave under both PFL and the FMLA, the employer may count both leave entitlements concurrently, **if** they provide the employee with appropriate notice. If the employer fails to provide this notice, then the employee will receive PFL benefits without using FMLA benefits. However, if an employer provides notice, and the employee declines to apply for payment pursuant to their PFL benefits, the employer may count the leave period against the employee's PFL entitlement. In those situations where an employer properly designates that a PFL leave period runs concurrently with an employee's FMLA entitlement, the employer may charge an employee's accrued paid time off pursuant to FMLA provisions. Employers may also provide employees with the option to use their accrued paid time off to receive their full salary during their PFL leave period; in turn, employers may seek reimbursement of PFL benefits through their insurance carriers.

FUNDING

Employers have two options for providing PFL benefits to their employees: either through an insurance policy rider issued by the employer’s disability benefits insurance carrier, or employers can elect to be self-insured if they meet certain criteria are approved to do so by the WCB. Employers are allowed to finance their PFL benefit obligations through an employee payroll deduction. In fact, employers have been permitted to begin collecting deductions since July 1, 2017. The maximum deduction from each employee is 0.126% of an employees’ weekly pay, capped at 0.126% of the state average weekly wage. Currently, the state average weekly wage is $1,305.92, making the current maximum weekly contribution $1.65 per employee.

WHAT SHOULD EMPLOYERS DO NOW?

There are several steps you should take to make sure you are ready for the roll-out of the PFL on January 1, 2018. These include:

- Contact your disability insurance carrier to make sure your policy now includes PFL leave benefits;
- Update employee handbooks and policy manuals to include the information required under the PFL.
- If you do not have a handbook, you should also create written guidance regarding the PFL to be handed out to all employees;
- Advise employees of the new payroll deduction they will see taken out of their paychecks (if you haven’t already done so);
- Provide managers with updated training on the PFL law, along with any new developments under the FMLA.

The labor and employment attorneys of Kelley Drye & Warren are available to assist employers of all sizes in meeting their initial compliance obligations under the PFL, and will be glad to assist employers with any compliance questions moving forward as the law goes into effect.