

Absent with leave

Paid Family Leave has begun in NY, but questions remain

By **BERNADETTE STARZEE**

Paid Family Leave took effect in New York at the start of the year, making most employees eligible for the significant benefit. Private employers were required to ensure their employees have paid family leave coverage by Jan. 1, which included setting up a policy through an insurance carrier and deducting employee contributions to fund the program.

However, employers continue to have questions as they wrap their heads around the new program that in 2018 provides eligible employees with eight weeks of leave at 50 percent of their average wage or 50 percent of the state's average wage (currently \$1,305.92), whichever is lower. This will graduate to 12 weeks at 67 percent of average wages in 2021; the 2019 and 2020 limits are 10 weeks at 55 percent and 60 percent of average wages, respectively.

Employees can take leave for bonding with a new child, whether biological, adopted or foster; caring for a sick family member, which could be a child, parent, parent-in-law, grandchild, grandparent, spouse or domestic partner; or spending time with a spouse, child, domestic partner or parent on active military duty or who has been notified of an impending call or order of active duty.

Tony Dulgerian, a senior associate in the labor and employment practice group in the Jericho office of national law firm Nixon Peabody, has been working closely with clients to set up systems and policies regarding the new law. Many clients have questions about the interplay between PFL and other laws and benefits.

"PFL interacts with the Family Medical Leave Act, short-term disability benefits, employee vacation and sick time, and if the company has its own paid parental leave policy, it interacts with that," Dulgerian said. "It's like a gigantic Venn diagram. Everything

has to work together, and it has been really challenging for clients."

Dulgerian gave one scenario: An employee goes to HR and says, "I'm having a baby."

"The employer says, 'Congratulations,' and then there are six different things they have to think about: PFL, FMLA, short-term disability, parental leave, vacation time," he said. "Every time they get a request for paid time off, they basically have to call a lawyer."

Both FMLA and PFL require that the employee's job (or an equivalent one) be guaranteed upon his or her return, but there are important differences between the two. Unlike PFL, FMLA is unpaid. Also unlike PFL, FMLA allows for leave for the individual's own health issue, but not to care for grandparents, grandchildren or domestic partners. And PFL covers all private-sector employers regardless of size while FMLA only applies to larger employers (there must be 50 employees within a 75-mile radius of the office).

Many Long Island employers are not large enough to be impacted by FMLA and therefore do not have experience dealing with protective leave.

"The biggest issue for these smaller employers is trying to figure out what protective leave means in the workplace," said Dominique Camacho Moran, a labor and employment law partner at Uniondale-based Farrell Fritz.

One of the biggest challenges is how to manage the workload in the absence of an employee on leave, which can be more difficult when there are fewer employees to pitch in, she said.

"What happens when you have multiple employees who want to be out at the same time?" Dulgerian said. "That's really a big question mark right now."

While smaller employers have had to deal all along with employee absences due to short-term disability, "now you could have employees that

get six weeks of short-term disability leave when they have a baby, and then take eight additional weeks of leave for baby bonding," Camacho Moran said. "Those two do not run concurrently. It could put an employee out for 14 weeks."

In addition there may be a glut of PFL requests early on, as people who took time off under FMLA in 2017 are allowed to take leave under PFL.

"If someone took 12 weeks off beginning in July to care for a sick parent, they will not be eligible to take time off under FMLA yet, but now they can take eight weeks under PFL," Camacho Moran said.

Someone who had a child in 2017 will be permitted to take PFL in 2018.

"Going forward, this leave will run concurrently with FMLA, but someone who had a baby in September and took leave under FMLA can now take an additional eight weeks under PFL," Dulgerian said.

Other questions Dulgerian encounters include how to handle requests from employees who wish to waive participation.

"A lot of our clients are having situations where employees are going to HR and saying, 'I want to opt out,'" Dulgerian said. "When they see the words 'payroll deductions,' some employees immediately want out. Unfortunately, it's not that easy."

Employees that work more than 20 hours a week are eligible for the benefit after working 26 consecutive weeks, while those who work less than 20 hours must work at least 175 days to be eligible for leave. However, these employees have to begin paying into the program from the beginning.

A very limited category of employees are allowed to waive participation.

"The waiver is intended for interns or seasonal employees who are only going to work for a short period of time and therefore, it is not anticipated that they will become eligible for leave," Dulgerian said. "The risk here is let's



Photo by Jim Lennon

DOMINIQUE CAMACHO MORAN: Small employers have no experience with protective leave and therefore need to learn what it means in the workplace.

say you have an intern who was originally going to work three months, and then you wind up hiring that person. That intern would have to then pay for PFL not only going forward but retroactively."

There are also questions about how much to deduct.

"The guidance says it should be capped at \$1.65 per week, but that's not necessarily the case," Dulgerian said. For instance, an employee that gets a \$50,000 bonus would only get \$1.65 deducted for the week of the bonus, but he may not be paying his fair share if he has a low weekly salary and has a smaller amount taken out throughout the year.

At the end of the day, Dulgerian said, "My advice is to talk to your payroll company and talk to your insurance carrier about how they calculate the deductions. Whatever they take from the employees should be the same amount the carrier is going to bill for premiums."

That's the point: the governor's goal with PFL is to make it free for employers (though some companies have chosen to pick up the tab for their employees, at least initially).

"The money should go directly from the employees to the carrier, and not cost the employer anything," Dulgerian said.