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## New York Paid Family Leave: employer FAQs answered

By Tony Dulgerian

As we previously reported, the New York State Paid Family Leave Benefits Law (PFL) will soon require New York employers of all sizes to provide their employees with paid family leave benefits beginning on January 1, 2018.<sup>1</sup> As 2018 rapidly approaches, employers should start planning now for the significant and burdensome requirements of the law and the finalized regulations. In an effort to clarify this regulatory minefield, we intend to publish a series of alerts—this being the first in the series—answering some of the most frequently asked questions regarding the PFL posed by employers.

### Summary of the PFL

To summarize the law, starting on January 1, 2018, employers must provide employees with paid family leave benefits to care for a family member with a serious health condition; to bond with a newborn, adopted or foster child; and to address a family member's military exigency. In 2018, employees can take up to eight weeks of leave under the PFL and this amount increases annually until 2021, when employees can use up to 12 weeks of leave. The benefit amount is equal to 50% of an employee's average weekly wage and capped at 50% of the average weekly wage in New York. The benefit amount and benefit maximum also increases annually until 2021, up to 67% of an employee's average weekly wage and capped at 67% of the statewide average weekly wage. The most recent statewide average weekly wage computed by the New York State Department of Labor is \$1,305.92—based on this figure, the maximum benefit amount for 2018 will be \$652.96 per week. PFL benefits are funded by employee contributions and employers can obtain coverage for the

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<sup>1</sup> <https://www.nixonpeabody.com/en/ideas/articles/2016/04/06/new-york-passes-landmark-legislation-raising-minimum-wage-and-mandating-paid-family-leave>.

payment of these benefits through a private insurance carrier or the New York State Insurance Fund. Employers can also choose to self-insure PFL benefits.

## **Frequently Asked Questions**

### ***How do employers calculate employee contributions?***

An employee's contribution rate is 0.126% of his or her **weekly** wages, capped at the **annualized** statewide average weekly wage. Thus, employers must calculate an employee's contribution rate every week. Also, according to recent guidance issued by the Department of Financial Regulations (DFS), the calculation of an employee's maximum contribution must be based on the employee's **total annual wages** to ensure that employees who earn irregular compensation pay their fair share of PFL contributions. Employee contributions are capped at 0.126% of the annualized statewide average weekly wage, which, for the calendar year 2018, will be \$85.56 (i.e.,  $\$1305.92 \times 52 \times 0.00126$ ). The DFS' guidance does not, however, describe how to calculate this figure on a weekly basis.

So how does this calculation work? Based on our conversations with a representative of the DFS, an acceptable means of calculating employee contributions is to take 0.126% of an employee's weekly wages, without applying a weekly cap, and stop taking contributions from the employee once he or she contributes \$85.56 in PFL premiums in 2018. For example, if a hypothetical employee earns \$2,000 per week in 2018, her PFL contribution will be \$2.52 per week until the employee reaches the annual cap of \$85.56, in the 34<sup>th</sup> week of the year, at which point she no longer needs to contribute to PFL benefits during 2018. This deduction methodology is similar to the Social Security portion of the Federal Insurance Contributions Act tax, which certain highly compensated employees stop paying in the middle of the year.

Before the DFS' recent guidance, the accepted wisdom was that employers could apply a \$1.65 per week cap to these payroll deductions in 2018. Following the DFS guidance, however, employers who apply such a cap run the risk of under-collecting PFL contributions. Ultimately, employers who have insurance coverage for PFL benefits should contact their carriers and determine how they will calculate the premiums for PFL coverage, since the contribution and premium amounts should be identical.

### ***How are employee contributions and PFL benefits taxed?***

Although the law and regulations are silent on this issue, the Department of Taxation and Finance recently issued guidance clarifying that employers should take payroll deductions for PFL benefits from after-tax wages. Employers should report employee contributions on employees' W-2 forms using Box 14 (state disability insurance taxes withheld). Employers that pay premiums should impute income. Employees may deduct premium amounts as part of state income taxes if they itemize their federal tax returns.

As for PFL benefits, they are considered taxable, non-wage income. In addition, taxes will not be automatically withheld from PFL benefits, but employees can request voluntary tax withholding. If

the New York State Insurance Fund or a carrier pays the PFL benefit to employees, they will issue a Form 1099-G or 1099-MISC, respectively, to the employee. Employees who do not itemize federal income taxes (and therefore did not deduct premiums paid) may reduce the taxable amount of PFL benefits by the value of premiums paid.

***This sounds complicated. Are small employers exempt from this law?***

No—the PFL applies to private employers of all sizes. However, the same categories of employees who are exempt for the purposes of statutory disability benefits are also exempt under the PFL, such as independent contractors, elementary/secondary school students, clergy, livery drivers, jockeys, “learned professionals,” teachers and executive officers in 501(c)(3) religious, charitable or education institutions, among several others.

***Are siblings included in the definition of “family member” under the PFL?***

No—employees cannot take PFL leave to address the needs of a sibling. Covered family members under the PFL generally includes children, parents (step and in-laws too), grandparents (step and in-laws too), grandchildren (step too), spouses and domestic partners. Note, however, that the scope of family members covered under the PFL is different depending on the type of leave requested. For example, if any of the above-referenced family members has a serious health condition, an employee can take PFL leave to care for that family member. However, employees who request PFL to address a qualified military exigency can only do so for a spouse, domestic partner, child or parent (step and in-laws too) of the employee.

***How does the PFL define a “domestic partner?”***

There are two ways someone can be considered an employee’s domestic partner: (1) someone registered as a domestic partner with either person’s employer, the state or any county, city, town or village; or (2) an individual who is dependent on the employee, based on a “nexus” of the following factors:

- common ownership of real or personal property,
- common householding,
- children in common,
- signs of intent to marry,
- shared budgeting, and
- the length of the personal relationship with the employee.

In any event, a domestic partner must be at least 18 years of age. A person who is related by blood to the employee in a fashion that would bar marriage to the employee in New York cannot be a domestic partner.

***Is there any time limit during which employees must satisfy the PFL eligibility requirements?***

No—once an employee is employed for 26 consecutive weeks (i.e., employees regularly scheduled to work 20 or more hours per week) or works for 175 days (i.e., employees regularly scheduled to

work less than 20 hours per week) he or she becomes eligible for PFL benefits, regardless of how long it takes the employee to do so. The PFL does not limit the timeframe it takes for an employee to become eligible for PFL benefits. Nor does an employee need to reach the applicable eligibility threshold every year. Rather, employees who become eligible for PFL remain eligible throughout their continuous employment. In the case of a rehire following a termination of employment, however, employees will be required to satisfy the eligibility criteria again before becoming eligible.

***Do employees who are not yet eligible for PFL benefits need to make contributions?***

Yes—so long as an employee does not file a waiver form, which only applies under limited circumstances, an employee must continue to make contributions for PFL coverage even if he or she is not yet eligible.

***How about employees who have children in 2017—is there any waiting period for them to start using PFL benefits in 2018?***

No—employees who give birth to a child, adopt a new child or foster a new child in 2017 could potentially start taking leave under the PFL on January 1, 2018, assuming they comply with the eligibility and notice requirements of the law and regulations, even if the employee took leave pursuant to the Family and Medical Leave Act or other leave in 2017 for the same child. Such employees can only take leave under the PFL during the 12-month period following the birth, adoption or placement of the child.

***Did the Board publish any forms in connection with the PFL?***

Yes—the Board published the employee application and certification forms, the waiver form and the application forms for employers who would like to voluntarily provide coverage to PFL-exempt employees. These forms are available here: <https://www.ny.gov/new-york-state-paid-family-leave/paid-family-leave-employer-and-employee-forms-0>.

***What should employers do between now and January 1, 2018?***

Employers should promptly examine and revise their leave policies to ensure that they are consistent with the PFL and its regulations. Indeed, the regulations require employers to update their policies or provide written guidance to their employees regarding the PFL. One of the most challenging issues in this regard is properly integrating the features of the PFL with employers' other leave policies.

To the extent an employer has employees who may be exempt from the law or may qualify for the limited waiver set forth in the regulations, employers should identify those folks now. Employers who elect to voluntarily provide PFL-exempt employees with PFL benefits may need to submit documentation to the Board and—if employers want to collect contributions from PFL-exempt employees—may need to obtain the written consent of 50% of PFL-exempt employees before doing so.

Employers should also review their coverage options and determine whether they want to purchase coverage through the state fund, a private insurer or to self-insure.

Be prepared for the new payroll deduction and the complicated calculations associated with the contributions. Coordinate with payroll to properly calculate the deductions as well as the eligibility requirements. Insured employers should also contact their carrier and determine precisely how the carrier will be calculating the premium rate and ensure that both the employer and carrier's calculations are accurate and consistent.

Employees taking PFL leave are entitled to receive health insurance benefits on the same terms as if they were still working. Thus, employers should establish a process for billing health insurance premiums during periods of PFL leave.

Employers should also be prepared to answer questions from their employees regarding the various benefits and requirements for using PFL benefits, particularly since some employees may be eligible to use these benefits immediately on January 1, 2018. Consider notifying your employees about these upcoming benefits in advance of the implementation date in order to avoid an avalanche of questions from employees during the first week of the year.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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