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New York paid family leave is here: more employer FAQs answered

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A new year means new compliance concerns for employers in New York. Effective January 1, 2018, the New York State Paid Family Leave Benefits Law (PFL) requires virtually all private employers to provide employees working in New York with paid family leave insurance benefits. As we previously reported, we are publishing a series of alerts answering employers' frequently asked questions about the complex requirements of the PFL.¹ This is the second alert in the series.

Frequently asked questions

How do you determine when an employee with an irregular work schedule becomes eligible for PFL insurance benefits?

Calculating an employee's eligibility for PFL benefits depends on how many hours per week the employee is regularly scheduled to work. Employees who are regularly scheduled to work twenty (20) or more hours per week are eligible for PFL after twenty-six (26) consecutive weeks, while employees who are regularly scheduled to work less than twenty (20) hours per week are eligible for PFL after working for one hundred and seventy-five (175) days.

How does this work for employees without a "regular" work schedule? For example, a part time employee may work less than twenty (20) hours in one week, but more than twenty (20) hours the following week—how do employers calculate that employee's eligibility for PFL benefits?

In response to the public comments to the proposed PFL regulations, the Workers' Compensation Board (Board) provided the following guidance:

- An employee's regular employment schedule depends on the facts and circumstances of the employment setting. The Board will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage.

¹ If you are interested in a brief summary of the PFL, along with additional answers to employer FAQs, please see our prior alert, [here](#).

Recently, the Board clarified the above guidance and posted the following information on the New York State PFL website:

- *What if an employee has varying hours worked on a job due to varying shifts?* Employees who work a regular work schedule of less than 20 hours per week are eligible for Paid Family Leave after 175 days worked. Employees with irregular schedules should look at their average schedule to determine if they work, on average, fewer than 20 hours per week.

According to this guidance from the Board, employers who have employees with irregular work schedules should calculate an employee's "average schedule" before determining whether the employee is eligible for PFL benefits. Since the Board did not explain how to calculate an employee's average schedule, employers may wish to consult with their carrier to confirm how they will calculate this figure, to ensure that the employer's eligibility determination is consistent with the carrier's determination.

If an employer has insurance coverage for PFL benefits, how does the claims procedure work?

Generally, if an eligible employee requests PFL for a qualifying reason, he or she should first submit the leave request to the employer with thirty (30) days' notice for a foreseeable leave and as soon as possible for an unforeseeable leave. The employee must make the employer aware of the qualifying event and the anticipated time and duration of the leave, but does not need to mention the PFL by name. Rather, if an employee requests leave that sounds like it may qualify for PFL, the employer should seek further information from the employee to confirm whether the leave request qualifies for leave under the PFL. In addition, employers should ask employees to complete the PFL-1 form (see below for a link to the PFL forms published by the Board).

Here is a summary of how the claims process typically works for employers who have insurance coverage for PFL benefits, from start to finish:

- Eligible employee asks employer for leave for a PFL-qualifying reason.
- Employer provides employee with PFL-1 form (Request for Paid Family Leave).
- Employee completes the PFL-1 form and provides it to the employer.
- Employer completes the employer portion of the PFL-1 form and returns it to the employee within three (3) business days. If applicable, the employer should indicate that it is seeking reimbursement from the PFL insurance carrier on the PFL-1 form and submit a claim for reimbursement to its PFL insurance carrier at that time.
- Employee completes certification forms, gathers any necessary supporting documentation and sends all forms and documentation to the carrier. The carrier will contact the employee directly if there are any issues with incomplete or missing documentation.
- The carrier pays or denies the claim within eighteen (18) days of the completed application and, if applicable, the carrier should issue reimbursement to the employer within the same time frame.

Employers should also consult with their insurance carrier and review the PFL rider to their short-term disability insurance policy for any additional requirements to the claims process.

Where can employers find the forms associated with the PFL?

Your PFL insurance carrier may provide you with the leave request and certification forms that must be provided to employees. If your carrier does not provide you with PFL forms, you can find them on the New York State PFL website, which are available [here](#). Please note that in November 2017, the Board updated all of the PFL request/certification forms (PFL-1, 2, 3, 4 & 5), which include the following changes:

- All forms now contain an updated cover page that notifies employees that they do not need to wait for approval from the insurance carrier before starting leave.
- The PFL-1 and PFL-5 (Military Qualifying Event) forms now contain specific instructions that define the terms “child” and “parent” in accordance with the PFL regulations.
- The PFL-2 form (Bonding Certification) now contains a check-box allowing employees to indicate that they are taking leave to bond with a child for whom they stand *in loco parentis*.

The Board also recently published a Formal Request for Reinstatement Regarding Paid Family Leave, which is available [here](#). Employees must complete this form and submit it to their employer and the Board if their employer refuses to reinstate them following a PFL leave, or subjects them to discipline, reduced pay or benefits or termination of employment. Employers can respond to an employee’s reinstatement request within thirty (30) days from the filing date of the request.

For insurance carriers, the Board also recently published the Notice of Total or Partial Denial of Request/Claim for Paid Family Leave Benefits form, which is available [here](#).

Aside from the PFL forms, the Board updated the Notice and Proof of Claim for Disability Benefits form (DB-450) to include references to the PFL, which is available [here](#).

Employers should ensure they are using the most up to date PFL and DBL forms, particularly since the Board recently modified the forms. Employers should also be aware that employees may use the Board forms to request PFL, even if an employer or its PFL insurance carrier uses their own forms.

What counts as “wages” for the purpose of calculating an employee’s average weekly wages?

An employee’s PFL insurance benefit amount is based on the employee’s average weekly wages (AWW) during an eight-week look-back period. An employee’s “wages,” for purpose of calculating an employee’s AWW, constitutes just about every form of remuneration the employer pays the employee—such as “salaries, commissions, bonuses and the reasonable money value of board, rent, housing, lodging or similar advantage received.” Salary and hourly remuneration is deemed paid in accordance with the employer’s regular payroll practices. Bonuses and other forms of irregular remuneration count as “wages,” but should be prorated on a weekly basis over a period of twelve (12) months, then added to the average weekly wage for twelve (12) months thereafter. Fortunately, the PFL-1 form includes an example of how the proration process works. Commissions which are paid per an employer’s usual payroll practices on regular payroll dates are not considered to be irregular remuneration and need not be prorated.

The reasonable money value of board and lodging may be counted as wages in one of three ways. First, the employer and the employee can reach an agreement regarding the value of the board or lodging. Second, if they do not reach an agreement, then the board or lodging is valued in the same amount as it may be counted as a credit towards the minimum wage. Third, if the employer and employee have not agreed upon the value of the board or lodging, and there is no statutory credit

towards the minimum wage allowable for same, then the value of the board or lodging which is reported under the Unemployment Insurance Law governs.

Tips and gratuities may also constitute a part of an employee's wages, so long as the employee is working in an occupation in which tips customarily constitute a part of their remuneration. Tips are valued as wages in one of two ways. As with board and lodging, the employer and employee may reach an agreement regarding the value of wages for PFL purposes. If they do not reach such an agreement, then the amount of tips which is customarily reported to the employer is their value for PFL purposes.

It should be noted that two types of payments are specifically exempted from the definition of wages. First, separation payments which an employer is statutorily obligated to make do not constitute wages. Second, employer benefits which are typically provided on a "class" basis, such as payments made by an employer for insurance benefits or into an annuity fund, are not considered wages.

How does the PFL interact with other laws and leave benefits?

Among all of the difficulties faced by employers under the PFL, tracking the relationship with other leave and benefits laws may prove the most challenging. For example, employers may need to track how PFL insurance benefits will relate to statutory short-term disability insurance (DBL) benefits, leave under the federal Family and Medical Leave Act (FMLA), sick and (effective May 5, 2018) safe time pursuant to the New York City Earned Sick and Safe Time Act (ESSTA) and even leave permitted under the employer's own policies.

– PFL and short-term disability insurance benefits

An employee may not use DBL at the same time as PFL. However, an employee may use DBL benefits and PFL benefits in succession such as, for example, when an employee uses DBL after giving birth to a child, then uses PFL to bond with the same child. An employee may use a maximum of twenty-six (26) weeks of DBL benefits and PFL leave in a twelve-month period.

– PFL and FMLA

An employee's PFL leave will generally run concurrently (at the same time) with FMLA leave, provided that the leave is sought for a reason available under both laws (for instance, to care for a spouse with a serious health condition). However, an employer must inform the employee of this concurrent designation, or the two types of leave will be deemed to run independently. Employers should also make clear in their policies that FMLA may, under certain circumstances, run concurrently with PFL.

Additionally, certain types of leave are available under the FMLA but not PFL, such as leave to care for the employee's own serious health condition. Under those circumstances, employees may use PFL and FMLA consecutively. For example, an eligible employee who breaks his or her leg, then wants to take leave to bond with a child, may be entitled to request twenty (20) weeks of leave in 2018—twelve (12) weeks of unpaid FMLA leave for the broken leg, then eight (8) weeks of PFL to bond with their child.

Employers should also account for the difference in intermittent leave under the PFL and FMLA. Specifically, while employees may take intermittent leave under the FMLA on a partial-day basis, partial-day intermittent leave is not available under the PFL. Rather, employees may only use PFL on an intermittent basis in full-day increments. However, pursuant to the PFL regulations, employers may deduct one day from an employee's PFL bank when an employee's

use of partial-day intermittent FMLA leave adds up to a full working day. For instance, if an employee whose typical workday is eight hours uses two hours of intermittent FMLA per day, an employer may deduct one day from the employee's PFL bank after four days of partial-day intermittent FMLA leave.

The PFL and FMLA also provide for different treatment of leave by members of the same family. Under the FMLA, an employer may not require spouses to use their FMLA benefits at different times, but are only required to allow the two spouses a combined total of twelve (12) weeks of leave if the leave is taken in connection with the birth or adoption of the employee's child or foster care placement, or to care for the employee's parent with a serious health condition. Conversely, while an employer may require family members (not just spouses) to use PFL to care for the same family member at different times, each family member is entitled to the full amount of PFL.

– ***PFL and paid time off (PTO)***

Employers may provide their employees with the option to use PTO, such as vacation or personal time, to supplement their pay during a PFL leave. Alternatively, employers may prohibit employees from using PTO during a period of PFL leave. Employers may not, however, require employees to use other forms of PTO during a period of PFL. If an employee elects to use PTO during a PFL leave, the PTO will run concurrently with the PFL.

If an employer allows its employees to use PTO during a PFL leave, there are multiple methods by which to structure the interaction between PTO and PFL. Employers should update their employee handbooks and leave policies to inform employees precisely how PTO benefits interact with the PFL.

– ***PFL and ESSTA***

According to guidance from the Board, ESSTA leave interacts with the PFL in a similar fashion as PTO. Based on this Board guidance, employers may allow their employees to use ESSTA benefits during PFL to supplement their pay.

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

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