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Labor & Employment Alert

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New Hampshire's innovative take on paid family medical leave: What employers should know?

By Shelagh C.N. Michaud

New Hampshire is the first state in the nation to offer a *voluntary* Paid Family Medical Leave (PFML) plan.



What's the Impact

- / NH PFML plan is voluntary option for employers to provide to employees with 6 or 12 weeks of paid leave.
- / Employers may elect to cover some or all of the costs and take a tax benefit or can pass costs on to their employees.
- / Some individuals may elect to purchase individual six week PFML plan if their employer does not provide NH PFML or an equivalent benefit.

It is becoming more and more common to hear of states passing or considering paid family medical leave (PFML) for employees. While the plans in each state vary, they all have one thing in common; they are mandatory for at least some employers. New Hampshire, in true New Hampshire fashion, set out to do PFML differently. Effective January 1, 2023, New Hampshire became the first state in the nation to offer a voluntary PFML plan. Here's what employers need to know about PFML in New Hampshire.

Under NH PFML, employers can purchase a PFML insurance plan from MetLife that provides up to 60% wage replacement for their New Hampshire employees for six to twelve weeks per year per employee, depending on the plan they choose.

Benefits under NH PFML

Under these plans, employees can take leave for the following reasons:

- / For their own serious health condition, including childbirth
- / To bond with a child during the first year after birth, adoption, or foster placement
- / To care for a family member with a serious health condition
- / For any urgent qualifying demand or need arising out of the employee's spouse, child, or parent being on active duty
- / To care for a service member with a serious injury or illness when the employee is the service member's spouse, child, parent, or next of kin

Like all PFML plans, New Hampshire defines the parameters of what conditions apply and who is covered in its own way. In New Hampshire, a "family member" includes the employee's:

- / Spouse or a domestic partner
- / Child, including biological, adoptive, foster, or stepchild, legal ward, or for whom the employee is standing in loco parentis, who is under 18 years of age or who is 18 years of age or older and incapable of self-care because of a mental or physical disability
- / Child's spouse or domestic partner
- / Parent, including biological, adoptive, foster, step, or legal guardian
- / Spouse's or domestic partner's parent, including biological, adoptive, foster, step, or legal guardian
- / Grandparent, including biological, adoptive, foster, or step

NH PFML defines a "serious health condition" as:

- / Conditions requiring inpatient care
- / Incapacity for more than three days with continuing treatment by a health care provider
- / Incapacity relating to pregnancy or prenatal care
- / Permanent or long-term incapacity
- / Certain conditions requiring multiple treatments
- / Chronic serious health conditions that may prevent a person from working for a minimum of four hours at a time

How NH PFML works

Employer-sponsored NH PFML is subject to a seven-day elimination period once per benefit year before employees receive benefit payments. Employees may take NH PFML all at once, on a reduced schedule with the reduction in four-hour increments, or intermittently over non-consecutive time periods with a minimum of four-hour increments.

Employees will receive wage replacement based on their average weekly wage, calculated as of the first date of a qualifying leave. An employee's average weekly wage includes all earnings (salary, bonuses, commissions, etc.) in the last four completed calendar quarters immediately preceding the first day leave is taken. An employee's benefit is capped at 60% of the Social Security taxable wage weekly maximum.

Employers who elect to purchase an NH PFML plan through MetLife are eligible for a business enterprise tax (BET) credit of up to 50% of the premium they pay on behalf of their employees (limited to six weeks of coverage). However, employers may also choose to require that employees pay all or a portion of the premium costs.

NH PFML and other leaves

Leave under NH PFML coordinates with other types of leave; for example, if employees receive short-term disability, long-term disability, or workers' compensation for leave, they cannot also receive NH PFML benefits. Similarly, NH PFML runs concurrently with Family and Medical Leave Act (FMLA) leave and employer-provided leave, such as maternity leave. Depending on an employer's policies, employees may be able to "top off" their NH PFML benefit with employer-paid time off or leave to receive 100% wages while on leave.

Importantly, NH PFML benefits may exceed FMLA benefits because FMLA does not have a seven-day exhaustion period before FMLA time begins, whereas NH PFML does; therefore, FMLA leave would begin seven days before NH PFML. Moreover, NH PFML provides broader coverage than FMLA because it provides benefits for employees who have been employed for less than 12 months and who work outside the 75-mile radius of 50 or more employees. NH PFML also provides intermittent leave for bonding with a child after birth or adoption, whereas FMLA does not.

NH PFML does not replace or change NH Pregnancy Leave under RSA 354-A. The two leaves will run concurrently if the employee does not have disability benefits that cover the Pregnancy Leave. Additionally, an employee who exhausts Pregnancy Leave before NH PFML leave may be eligible to remain out on leave for their own serious health condition and/or for bonding with the newborn child, or the employee could utilize NH PFML benefits later in the child's first year as permitted under the plan.

Requirements specific to large employers

For employers with 50 or more New Hampshire employees, RSA 275:37-d requires job protection for and prohibits discrimination and retaliation against any employee who receives wage replacement under an employer-sponsored plan, including employer-sponsored PFML plans. Large employers must also arrange for employees who opt to enroll in an individual plan to pay

their premiums through a payroll deduction and must maintain employee health insurance during leave (but employees must continue to pay their share of the premiums, if applicable).

Individual PFML plan option

Through March 2 each year, individuals who work for New Hampshire employers and self-employed, sole proprietors who do not employ any employees may also purchase an individual six-week PFML plan if their employer does not provide NH PFML or an equivalent benefit. Leave taken under an individual plan is not job-protected leave, but employers should be aware of other laws, such as the Americans with Disabilities Act or FMLA, which may prohibit discrimination against employees who take medical leave. Employees who decide to purchase an individual plan will be subject to a one-time seven-month waiting period. Individual plan premiums are capped at \$5 per week, and there is no twelve-week option for individual plans, but employees can stack time off using their individual plan benefits in addition to an employer-provided paid leave, such as when an employer offers maternity or adaption leave. Employers are required to cooperate and provide information to plan administrators when their employees on individual plans file a claim for benefits.

It remains to be seen how many New Hampshire employers (or individual New Hampshire employees) will opt into NH PFML. Employers need to carefully consider the benefits of offering PFML—offering wage replacement for employees during their or a family member’s health crisis, providing a valuable benefit to employees that may set them apart in the marketplace, and improving worker confidence and morale in the workplace to name a few—against the costs of introducing new leave into the workplace as well as the complex interplay between NH PFML and other types of leave and job protections. Regardless of what individual employers decide, New Hampshire has presented a creative option that provides both employers and employees choice while also ensuring paid benefits for New Hampshire employees who need such benefits.

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

[Shelagh C.N. Michaud](#)

401.454.1133

smichaud@nixonpeabody.com
