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ALLIANCE

New York Publishes Revised Regulations for Implementation of Paid Family Leave Law and Establishes Maximum Employee Contribution for Coverage

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As discussed in our [April 2016](#) alert, last year, New York enacted one of the most comprehensive statewide paid family leave laws in the country. Under the Paid Family Leave Law (PFL), New York employers will be required to provide eligible individuals with paid time off from work in order to care for an infant, care for a family member with a serious health condition, or relieve family pressures when someone is called to active military service.

The PFL will go into effect on January 1, 2018, and will be fully phased into implementation by 2021. On January 1, 2018, individuals will be entitled to take 8 weeks of paid leave under the PFL and will be entitled to receive 50% of their average weekly wage or 50% of the state average weekly wage, whichever is lower. Upon full implementation of the PFL in 2021, eligible individuals will be entitled to receive up to 67% of their average weekly wage or 67% of the state average weekly wage, whichever is lower, for up to 12 weeks in a 52 consecutive week period. Despite coverage not commencing until January 1, 2018, employers may commence payroll deductions to fund the PFL policy premiums as of July 1, 2017.

In February 2017, the New York State Workers' Compensation Board (WCB) published proposed regulations to provide clarity to employers, insurance carriers and employees regarding their rights and responsibilities under the PFL. These proposed regulations were discussed in our [March 2017](#) Alert. Following the comment period on the

February 2017 proposed regulations, the WCB recently issued revised proposed regulations.

The following aspects of the revised proposed regulations are of significance to employers:

Employee Eligibility – The revised proposed regulations eliminate the terms “full-time” and “part-time” for purposes of determining eligibility for benefits under the PFL. Instead, the revised proposed regulations state that employees of a covered employer whose regular employment schedule is 20 or more hours per week shall become eligible to take family leave provided that the individual has been employed by the employer for at least 26 consecutive weeks. For those employees who regularly work less than 20 hours per week, they shall become eligible to take family leave after completing 175 days of employment.

Family Leave Waivers – Consistent with the elimination of the “full-time” and “part-time” definitions from the proposed regulations, the revised proposed regulations state that an employee of a covered employer may file a waiver of family leave benefits if either their regular schedule is 20 or more hours per week and they will not work 26 consecutive weeks or their regular schedule is less than 20 hours per week and they will not work 175 days in a consecutive 52 week period.

Notice Requirements – The revised proposed regulations added a section discussing the notice that employees must provide to employers

regarding their intent to take leave under the PFL. If such leave is foreseeable, the employee must provide the employer with 30 days advance notice of the need for such leave. Additionally, if the employee is taking intermittent leave, an employer may require the employee to provide notice as soon as practicable before each day of intermittent leave. Pursuant to the revised proposed regulations, practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in each individual case.

Interaction with the Family and Medical Leave Act (FMLA) – The revised proposed regulations include the following provisions with respect to the FMLA:

- If an employee takes FMLA leave for their own serious health condition, **it does not reduce** the amount of paid family leave that an employee is entitled to. However, an employee cannot collect more than 26 combined weeks of New York State disability benefits and PFL benefits in the same 52 consecutive week period.
- If an employer designates an employee’s FMLA leave for a purpose also covered by the PFL and advises the employee of their eligibility for benefits under the PFL, but the employee decides to not apply for such benefits, the employer can count the period of leave against the employee’s maximum benefit entitlement under the PFL.
- Employers covered by the FMLA that designate a concurrent period of leave for the PFL and the FMLA may apply an employee’s accrued paid time off towards such leave. However, employers may only do this if they are covered by the FMLA and the reason that the employee is taking PFL leave also qualifies for leave under the FMLA.
 - Please note, however, that the revised proposed regulations remain silent on the interaction between the PFL and the New York City Earned Sick Time Act. Therefore, there is an issue as to whether PFL leave and New York City Sick Leave may run concurrently.

Complaints Regarding Reinstatement – In the event that an employee is not reinstated by their employer following PFL leave, prior to filing a discrimination complaint with the New York State Workers’ Compensation Board (WCB), the employee must file a formal complaint with the employer and the WCB. The employer then has 30 days to either reinstate the employee or file a formal response to the complaint. The two-year statute of limitations for an employee to file a complaint of discrimination under the PFL commences upon the employer’s response to the formal complaint or the day after the expiration of the 30-day response window.

In addition to the revised proposed regulations, on June 17, 2017 the WCB issued the premium rate for benefits under the PFL for 2018. Pursuant to the decision issued by the WCB, employees shall be required to pay 0.126% of their weekly wage up to and not to exceed the statewide average weekly wage, which is currently \$1,305.92, as a premium for benefits under the PFL.

New York employers should review their payroll practices and policies regarding leave, including leave pursuant to the FMLA, to ensure that as of January 1, 2018, they comply with the requirements of the PFL. Fox Rothschild will continue to provide updates and alerts on the PFL, as it is anticipated that the WCB will issue further revised proposed regulations for implementation of the PFL to address several outstanding issues, including the interplay between the PFL and the New York City Earned Sick Time Act.

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