

New York's Paid Family Leave Proposed Regulations: A Primer for Employers

On February 22, 2017, the New York State Workers' Compensation Board unveiled proposed regulations concerning the state's new Paid Family Leave (PFL) law. The PFL law was passed as part of the 2016 state budget and will eventually require virtually every New York employer to provide employees with up to 12 weeks of paid leave: (1) for the birth, adoption, or placement of a new child; (2) to care for a family member with a serious health condition; or (3) for a qualifying exigency arising from a family member's military service (as defined in the federal Family and Medical Leave Act). This program will be funded through employee payroll deductions. PFL is not intended to cover an employee's own serious health condition; rather, PFL is intended to complement the already existing state disability insurance program. The basics of the PFL law can be found in the [April 12, 2016 New York Labor and Employment Law Report](#) on this subject.

The Workers' Compensation Board will be accepting comments on the proposed regulations for 45 days from the date of their release — until April 7. Click [here](#) to review the proposed regulations and to access an online link to submit comments. The state also recently launched a [website](#) providing information about PFL for employers and employees and set up a new helpline. Notably, however, the details on this new PFL website reflect the program as it would exist under the *proposed* regulations, meaning the information there is not yet final (despite how it appears).

The proposed regulations contain a great deal of detail to digest, but several significant points will immediately catch the attention of employers:

- First, the state proposes a system where employees apply directly to the employer's insurance carrier for PFL benefits. The employer merely completes one section of a claim form before it is submitted to the carrier by the employee. The insurance carrier makes the final determination — not the employer. The proposed regulations provide specific details on the format, contents, and timing of claims and decisions on claims. This is significant because the insurance carrier's determination will have an impact beyond just the payment of benefits to the employee: it will also require the employer to protect the employee's job, and to maintain his/her health insurance benefits for the duration of the leave. Additionally, for employers and employees covered by the Family and Medical Leave Act (FMLA), FMLA and PFL benefits will typically run concurrently (more on this below). Therefore, employers will be faced with a situation where they are making a leave decision simultaneously with an insurance carrier for the same exact leave. There could be a situation where the employer denies leave, and the carrier approves it. (Consider, for example, a situation where the employer believes the medical certification is not sufficient, but the carrier disagrees.) Additionally, the proposed regulations do not include any key employee exceptions like FMLA. Thus, no matter the size of the employer or the role played by the employee, once the carrier approves the leave, the employer must grant it and guarantee reinstatement at the conclusion of the leave.
- Second, the proposed regulations set up an arbitration system for the purpose of appealing claims denials. The arbitrator is appointed by the State Workers' Compensation Board. The proposed regulations do not appear to contemplate a situation where the employer could appeal because it believes the benefits were wrongly awarded. Moreover, it is easy to anticipate the complications that could arise if an arbitrator reverses a claims denial. If the employer denied the time off because the claim was denied and the purpose for the leave has long passed, what is the employee's remedy? On the other hand, if the employee already took the time off but used paid time off, do they receive PFL benefits on top of the wages already received? Must the employer restore the employee's paid time off that was used? All of this is unclear.
- Third, employers cannot require employees to use accrued paid time off (such as PTO, sick, or personal time) for the requested PFL time. It can offer the option and then, if the employee elects this option, seek reimbursement from the insurance carrier. If the employee elects to use accrued paid time, the employee is still entitled to be reinstated. If an employee declines this option, he or she can effectively save PTO to be used after his or her return from PFL (which is likely inconsistent with the reason the employer offered various forms of PTO in the first instance).

- Fourth, state disability and PFL will not run concurrently. This means that in the case of maternity leave, it appears that an employee could conceivably collect disability payments for the first 6-8 weeks of leave (which would not be a PFL-covered absence), and then transition to PFL for an additional 12 weeks job-protected paid leave, for a total of 18-20 weeks off with partial pay.
- Fifth, the regulations do allow PFL and FMLA leave to run concurrently (as mentioned above). However, this will hinge on the employer designating the leave as FMLA leave by providing the notice required under the federal FMLA regulations. Employers need to remember to provide the FMLA designation notice. The insurance carrier's acceptance of a claim for PFL benefits does not automatically cause FMLA leave to run concurrently. Also related to the interplay with FMLA, the differing eligibility standards between PFL and FMLA sets up a situation where a new employee becomes eligible after only working 26 weeks for the employer, and can immediately take up to 12 weeks of job-protected leave. Then, once the employee returns to work and reaches the FMLA threshold of 1,250 hours in 12 months, the employee will be eligible for another 12 weeks of job-protected leave.

A few other aspects of the proposed regulations will also interest employers. Under the proposed regulations, disability insurance carriers will be *required* to offer PFL coverage in conjunction with their existing disability insurance policies. Employees who are covered by a disability insurance policy will automatically be covered for purposes of PFL effective January 1, 2018. Carriers who choose to get out of the disability insurance business in New York, so as to avoid administering the PFL insurance program, must notify New York State by the earlier of July 1, 2017 or within thirty days of the date the community rates for premiums are published by the state (or within 180 days of discontinuing coverage, if discontinued after 2018). Employers who are self-insured for disability purposes have the option of either self-insuring for PFL benefits or obtaining alternative coverage. The employer must make the election to self-insure by November 30, 2017.

Unionized employers with leave provisions in their collective bargaining agreement that are at least as favorable to employees as the PFL program are exempt from the law. However, it is not clear who will make the determination of whether the CBA's benefits are sufficiently favorable. Additionally, public employers are only covered if they elect to opt-in.

These are just a few highlights. There is much more detail covered in the 48 pages of proposed PFL regulations. Employers should take the time to review these regulations and submit comments to the Workers' Compensation Board on how the proposed provisions will impact their workplace.

It is possible that many aspects of the regulations will change between now and when they are finalized. Due to the unknown, we do not recommend that employers begin drafting and revising leave policies on the basis of these proposed regulations. However, we do recommend that employers take an inventory of current leave practices and policies and begin to anticipate how they might need to change. Once the final regulations are published, it will be critical for employers to quickly respond. Among other things, employers will be required to provide written details of how PFL benefits are administered to employees. Those written details will need to reflect the processes set forth in the final PFL regulations.

We will continue to analyze these proposed regulations and provide additional updates on how they might impact your workplace.

If you have any questions about this Information Memo, please contact [Kristen E. Smith](#), or any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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