New York Paid Family Leave ("PFL") - Answers to Your Questions

New York state employees will be able to take paid leave from covered employers beginning January 1, 2018 to:

- Bond with a child following birth, adoption or foster care placement,
- Care for a family member with a serious medical condition, and
- Assist family military members for a qualifying FMLA exigency.

The benefit in 2018 will be 50% of an employee’s average weekly wage ("AWW") during the 8 weeks prior to the leave, not greater than the statewide AWW. The benefit will be payable for up to 8 weeks in a 52-consecutive week period. The benefit will increase to 67% of AWW payable for 12 weeks in 2021. The benefit will be fully funded by employee contributions, set at .126% times weekly wages not greater than the statewide AWW. Effective July 1, 2017 the statewide AWW will be $1,305.92. Therefore, the maximum weekly PFL benefit beginning January 1, 2018 will be $652.96 [50% x $1,305.92] and the maximum weekly contribution will be $1.65 [.126% x $1,305.92].

More information about NY PFL may be found in our earlier updates here and here.

Employers have many questions as they begin to prepare to comply with PFL. The following provides answers to some common concerns employers are expressing, based on the latest information available (revised proposed rules issued May 24, 2017) and is subject to change.

1. When do my employees become eligible for PFL?

Employees scheduled to work 20 or more hours per week are eligible after working 26 consecutive workweeks. Time away from the office when an employee is on approved time off (other than NY DBL) will count towards PFL eligibility provided the employee contributions continue to be paid. Employees who are scheduled to work less than 20 hours per week become eligible on the 175th day they have worked for the covered employer.

2. How are temporary or seasonal employees treated under PFL?

Temporary or seasonal employees scheduled to work 20 or more hours per week whose assignment is likely to be less than 26 consecutive weeks (or those who are scheduled to work less than 20 hours per week and less than 175 days), can elect to opt out of paying the required weekly PFL contribution. However; within 8 weeks of any change in the employee’s work schedule (i.e. the employee will continue working beyond 26 weeks or 175 days), employers must begin taking the required PFL contributions and collect amounts owed back to the date of hire.

3. How will an employee’s break-in-service impact eligibility for PFL?

The revised proposed rules do not directly address the situation where an employee has a break-in-service. For example, when an employee terminates employment and returns to the employer after a two or three month break-in-service, it currently appears the employee will need to satisfy the 26 consecutive workweek requirement from the date of re-hire in order to qualify for PFL.

4. When must employers begin to withhold PFL employee PFL contributions?

Employers must withhold PFL employee contributions beginning January 2018. Employers have the option to begin collecting employee PFL contributions as early as July 1, 2017. PFL and NY Disability ("DBL") will be covered under a single insurance contract and payment for both coverages will be payable at the same time as a single premium payment, although the bill can outline the separate costs for DBL and PFL. Here are a few points to consider when deciding when to begin collecting employee contributions:

- When will the insurance premium for DBL/PFL be required? Will the carrier bill in advance or in arrears?
- If a premium is due prior to collecting employee PFL contributions, employers cannot withhold an amount greater than the maximum weekly contribution to make up for the shortfall at that time (except in the temporary/seasonal example noted above). Employers may collect contributions after the premium payment has been submitted in order to cover the cost of the PFL premium.
- Employers must promptly return to employees any surplus in employee contributions that exceed the annual premium.

In general, we suggest employers wait to begin collecting PFL contributions until more information becomes available, including final regulations from the state and payment requirements from the DBL/PFL carriers. Employers who will be self-funding the
PFL benefit may wish to begin collecting contributions as soon as possible to build a reserve to pay claims early in 2018.

5. How does the Family Medical Leave Act (“FMLA”) impact PFL benefits?

FMLA and PFL may run concurrently for leave that qualifies under both programs. Employers should make sure to properly notify employees about their FMLA and PFL benefits. An FMLA leave for an employee’s own serious medical condition does not qualify as PFL. The revised proposed rules better align PFL with FMLA to help prevent employees from stacking and extending leave time away from work. Furthermore, it seems plausible that two sets of paperwork and certifications may be necessary when a leave qualifies under both FMLA and PFL.

- If (1) an employer designates a leave to be covered under FMLA which can also qualify under PFL, and (2) the employer has provided all the necessary information to the employee under both programs, and (3) the employee declines to apply for PFL benefits by not submitting the necessary paperwork and certifications to the carrier, then the employer may deduct the leave time from the employee’s maximum allowable PFL leave time in the 52-week period.

- Intermittent PFL may only be taken in full day increments; FMLA may be taken in less than full-day increments. If an employee elects to take FMLA in less than full day increments, an employer may track these FMLA hours and deduct one day of PFL leave time when the FMLA hours taken (during a concurrent leave) equals the hours in an employee’s usual workday.

6. How does our company’s paid time off policies interact with PFL benefits?

PFL may also interact with an employer’s paid time off policies however; it will be important to determine whether the PFL absence also qualifies under FMLA.

- If an employee’s leave does not qualify under FMLA (i.e. the employee is taking leave to care for a seriously ill grandparent or the employer is not subject to FMLA), the employee may elect to use accrued paid time off to receive full salary; the employer may not require the employee to do so.

- Under FMLA, an employer may require an employee to use accrued paid time off during FMLA absences (other than for an employee’s leave pursuant to a disability). When PFL runs concurrently with FMLA, the revised proposed rules now allow an employer to charge an employee’s accrued paid time off in accordance with FMLA provisions.

7. May employers be reimbursed by the DBL/PFL insurance policy if an employee receives full pay in lieu of PFL benefits?

The revised proposed rules clearly allow employers to be reimbursed under the policy when an employer offers and the employee elects to use accrued paid time off to receive full salary during the PFL absence. However; what is still unclear at this time is whether an employer covered by FMLA that designates the leave as PFL and requires an employee to use accrued paid time off in accordance with FMLA rules will qualify for reimbursement under the policy. Hopefully this will be addressed in the final rules.

8. What is the process for employees to file a claim for PFL benefits?

An employee must provide an employer 30-day advance notice for a foreseeable qualifying PFL event, otherwise as soon as practicable. An employee must complete the Request for Paid Family Leave (currently Draft Form PFL-1), submit the Form to the employer to report additional information which must be returned to the employer within 3 business days. The employer must also complete and submit the necessary certifications and/or documentation to the PFL insurance carrier who will accept or deny the claim, generally within 18 days. If the carrier denies the claim, the employee will be provided guidance on why the claim was denied and what, if any, missing or additional information must be submitted.

9. Will the PFL benefit amount and the maximum PFL duration change if an employee’s PFL leave extends from 2018 – 2019?

No. The PFL benefit amount and the maximum PFL duration will be established at the onset of the PFL qualifying event. For example, assume JJ commences PFL to take care of his seriously ill mother in December 2018 and the leave extends into 2019. JJ will be entitled to 50% of AWW for a maximum of 8 weeks in the 52-week period that begins December 2018.

10. What is the PFL benefit when an employee takes PFL on a daily basis rather than in weekly increments?

PFL may be taken in weekly or full-day increments. The daily PFL benefit will be based on an employee’s average weekly wages and the average number of days worked per week over the last 8 weeks. For example, an employee who works 5 days per week and has AWW of $900 in 2018 will be entitled to $90 per day [50% x $900/5] for 40 days [5 days per week x 8 weeks]. An employee who works 4 days per week would be entitled to a daily PFL benefit of $112.50 [50% x $900/4] for 32 days [4/5 x 40 days]. In either scenario, each employee would be eligible to receive a maximum benefit of $3,600.

Note: Weekly wages includes every form of remuneration for employment paid by the employer to his employee, whether paid directly or indirectly, including salaries, commissions, bonuses and the reasonable money value of board, rent, housing, lodging or similar advantage received.