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Know New York State's New Paid Family Leave Benefits Law

By Sheryl B. Galler

Next year, New York will provide employees in the state with paid family leave. New York's Paid Family Leave Benefits Law ("PFL Act") goes into effect as of January 1, 2018, and will be phased in over the course of four years.¹ At the end of the phase-in period, New York State will provide 12 weeks of paid family leave, one of the longest paid leave periods in the United States.

A Brief History of Paid Leave Laws in the United States

In the United States, on the federal level, private employers are required to provide only unpaid family leave. The federal Family and Medical Leave Act of 1993 ("FMLA of 1993") provides 12 weeks of unpaid job-protected leave for the employee's own serious health-related event, for the birth or adoption of a child, or to care for a spouse, a parent or a child who has fallen ill.² The federal law, by its terms, covers between 50 percent and 60 percent of the private workforce.³ However, as a practical matter, many

eligible workers cannot afford to take this leave because it is unpaid.⁴

According to Human Rights Watch, "[t]he U.S. is alone among developed countries in failing to guarantee at least some form of paid family leave."⁵ Most countries worldwide provide some form of maternity leave and many also guarantee paid paternity leave.⁶

On the state level, New York is the fifth state, after California, New Jersey, Rhode Island and Washington, to pass a law granting eligible employees – women and men – paid family leave.⁷ California, New Jersey and Rhode Island offer paid family leave for employees to care for a family member with a serious health condition or to bond with a child within 12 months of its birth or adoption. California and New Jersey offer six weeks of paid leave and Rhode Island offers four weeks of paid leave.⁸ In each of those three states, paid family leave is part of short-term disability insurance and the premium is funded by employee payroll deductions. Washington State's legislature indefinitely delayed implementation of its law, which was scheduled to take effect in October 2009.⁹

In March 2015, Senator Kirsten Gillibrand of New York and Representative Rosa DeLauro of Connecticut introduced the Family and Medical Insurance Leave Act (“Family Act”).¹⁰ The Act seeks to provide coverage for employees and the self-employed nationwide, regardless of the size of the employer, with up to 12 weeks of paid family leave with partial wage replacement. The Family Act would cover employees taking leave due to their own serious health condition or the serious health condition of a close relative, or due to the birth or adoption of a

PFL Act provides benefits that go beyond the regulatory programs currently in place. New York’s short-term disability insurance provides partial wage replacement – but not a guaranteed leave of absence – to employees with non-work related temporary disabilities. The FMLA of 1993 provides a leave of absence – but not wage replacement – to employees to care for a newborn or adopted child, to care for a family member with a serious illness or to care for family members when another member is called to active military duty.¹⁷

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child, or due to family needs upon a call to active military service. The Act would create a social insurance program under the auspices of the Social Security Administration, which would be funded by both employers and employees through small payroll deductions.¹¹

NYSBA Supports Paid Family Leave

In consultation with the NYSBA, the State Bar’s Committee on Women in the Law (CWIL) prepared a comprehensive 26-page report analyzing the need for paid family and worker leave in the United States, the details of the proposed 2015 Family Act and the potential impact of that Act.¹² The final report may be found on CWIL’s committee webpage.¹³ CWIL presented its report to the State Bar’s Executive Committee and House of Delegates and recommended that the NYSBA support enactment of the Family Act. In November 2015, the Executive Committee and the House of Delegates adopted a resolution supporting the legislation to provide paid leave benefits, and approving the report and recommendation of the Committee of Women in the Law. As a result of CWIL’s efforts, the NYSBA leadership made paid leave a 2016 NYSBA legislative priority and put the full NYSBA government affairs muscle behind efforts to further paid leave legislation.

Senator Gillibrand and Representative DeLauro reintroduced the Family Act in February 2017.¹⁴ The new White House administration, as of February 2017, expressed support for some form of paid leave for new parents.¹⁵

Summary of the NYS Paid Family Leave Benefits Law

New York’s Paid Family Leave Act provides employees with both leave time and partial wage replacement. Employees may use this paid leave to care for a newborn or adopted child, to care for a family member with a serious illness and to care for family members when another member is called to active military duty.¹⁶ The

The PFL Act, which is a series of amendments to the New York State Workers’ Compensation Law, creates an insurance program that will supplement New York’s short-term disability insurance and cover the benefits available under the Act.¹⁸

Key details and decisions needed to implement the Act have not yet been finalized but, by law, must be in place by June of this year.¹⁹ As such, in late February 2017, the New York State Workers’ Compensation Board and New York State Department of Financial Services issued proposed rules for public comment (due April 10, 2017).²⁰

As the effective date of the PFL Act is approaching, employers and employees should become familiar with the basic provisions of the Act and how they can prepare for its implementation.²¹

The PFL Act Covers Most Private Employers and Employees in New York

Private employers in New York with at least one employee will be required to provide benefits under the PFL Act. In contrast, the FMLA of 1993 applies only to employers with 50 or more employees.

Full-time private employees who have worked for at least 26 weeks and part-time private employees who have worked at least 175 hours during the calendar year will be eligible for benefits under the PFL Act.²² In contrast, the FMLA of 1993 applies only to employees who have worked for the employer for at least 12 months and/or at least 1,250 hours during the 12-month period prior to the leave.²³ Under the PFL Act, eligible employees will be entitled to benefits from the first day they are needed, without any waiting period.

Employees who are not working at the time of a triggering event, such as employees who are on leave while collecting workers’ compensation, will not be eligible for benefits under New York’s Act.²⁴ Independent contractors are not automatically eligible for paid leave under

the Act either, but may purchase their own insurance.²⁵ Employees' citizenship status and immigration status will not affect eligibility under the Act.

New York's Paid Leave Act Specifies Eligible Uses for Paid Family Leave

The PFL Act provides eligible employees with paid leave for only the following purposes:

1. For a father or mother to bond with a new child, whether born to the family, adopted by family or taken as a foster child, during the 12 months after the child joins the family.
2. To care for a close relative with a serious health condition. The Act defines a close relative as a child, parent, parent-in-law, grandchild, grandparent, spouse or domestic partner. The relative does not have to be in New York. The Act defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility [or] continuing treatment or continuing supervision by a health care provider."²⁶ This does not include illnesses such as the common cold, flu, upset stomach, headaches (except migraines) and similar conditions.
3. To care for a close relative when another close relative has been called to active military service.²⁷

Employees may not seek paid family leave under the New York Paid Family Leave Act for their own health condition or for an employee's own military service.

New York's Act Mandates Additional Insurance Coverage

As of January 1, 2018, every employer in New York State must carry Paid Family Leave coverage in addition to disability coverage, and every disability benefits policy in New York State must include Paid Family Leave coverage. Employers who are self-insured for disability claims can self-insure for claims under the PFL Act.²⁸

Insurance Premiums Will Be Paid by Employees

Premiums for the new Paid Family Leave coverage will be paid by the employees, through payroll deductions. The insurance policy will pay out the benefits (that is, partial wage replacement) to employees on paid leave.

Employee payroll deductions may begin on July 1, 2017. The regulations issued for public comment in February 2017 will determine, among other things, the maximum rate of the employees' contribution.

New York's Paid Leave Will Be Phased in Starting in 2018

As of January 2018, employers will be required to provide eight weeks of paid leave. In 2019 and 2020, employers will be required to provide 10 weeks of leave. Starting in 2021, employers will be required to provide 12 weeks of leave.²⁹

The statutory leave amounts – eight, 10 and 12 weeks of paid leave – are the maximum benefits allowed within any 52-week period. As such, an employee who takes eight weeks of paid leave to care for a newborn in 2018 will not be entitled to additional paid leave in the event a family member becomes seriously ill during the same year. The 52-week period starts on the first day the employee takes paid family leave.

Unless otherwise expressly permitted by the employer, an employee using benefits available under FMLA must use them concurrently with paid family leave benefits.³⁰

Employees are not required to take leave time during which they receive their full salary (such as sick leave or vacation time, if any) before taking paid family leave. Employers can permit, but *cannot* require, employees to take sick leave or vacation time before taking paid family leave.³¹

Employees may take paid family leave on a full-day basis only. However, employees may take paid family leave intermittently. So, for example, an employee entitled to eight weeks (40 days) of paid leave may take a leave of absence for two days per week over the course of 20 weeks.

Unless otherwise expressly permitted by the employer, an employee using benefits available under FMLA must use them concurrently with paid family leave benefits.

Employers may offer more generous paid leave time, in which case employees will not be eligible for statutory paid leave in addition to the time offered by the employer.

Wage Replacement Will Be Phased in Starting in 2018

In addition to leave, employees will be entitled to a partial wage replacement during their leave time. The wage replacement will be determined by a percentage of the employee's average weekly wage. The amount is not unlimited, however, but will be capped at a percentage of the statewide Average Weekly Wage (AWW), which is determined each year by the New York State Department of Labor.³²

During each year of the phase-in period of the Act, both the percentage of the employee's average weekly wage and the cap will increase from 50 percent to 67 percent. In 2018, employees on paid leave will be entitled to 50 percent of the employee's average weekly wage, capped at 50 percent of the AWW. In 2019, employees on paid leave will be entitled to 55 percent of the employee's average weekly wage, capped at 55 percent of the AWW. In 2020, employees on paid leave will be entitled to 60 percent of the employee's average weekly wage, capped

at 60 percent of the AWW. In 2021 and subsequent years, employees on paid leave will be entitled to 67 percent of the employee's average weekly wage, capped at 67 percent of the AWW.³³ The State Superintendent of Financial Services may delay these increases if it is determined that the increases would negatively impact the state's economy.

Employees may combine disability leave under New York's short-term disability program and paid family leave for a total of 26 weeks in any 52-week period. For example, an eligible employee may take disability leave

as birth or adoption records, medical certification or military orders – in support of the request.³⁹ Employers likely will also be required to complete and submit documentation to the insurer regarding the dates of employees' paid family leave.

Practical Advice to NYS Employers and Employees

In preparation for the January 2018 effective date of the New York Paid Family Leave Benefits Act, employers should confirm that their disability insurance provider is adding insurance to cover claims for paid family leave, or

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for a pregnancy-related disability followed by paid leave to care for a newborn. However, employees cannot collect disability payments and paid leave benefits at the same time.³⁴

New York's Paid Leave Act Provides Job Protection

An employee who takes paid family leave under the Act is entitled to return to the same job or a comparable job (that is, one with comparable benefits, comparable pay, and comparable other employment terms and conditions). If an employer does not return the employee to the same or comparable job, the employee must formally request reinstatement.³⁵

If the employee on leave was part of the employer's group health insurance plan, the employer must continue to provide health insurance to the employee on leave. If the employee contributed to the cost of the health insurance coverage before taking leave, then the employee must continue to pay his or her share of the health insurance premiums while on paid family leave.³⁶

Discrimination and Retaliation Are Prohibited

Employers may not discriminate against, or retaliate against, an employee who takes paid family leave.³⁷

Notice and Documentation Are Required

Employees are responsible for notifying their employers if they plan to claim paid family leave. If the event triggering the leave request is foreseeable, employees must give their employers 30 days advanced notice. If the triggering event was not foreseeable, the employee must notify his or her employer of the leave request as quickly as possible.³⁸

Employees seeking paid family leave will need to file a written request and provide documentation – such

take the necessary steps to self-insure against such claims. If New York, as required by the Act, issues regulations by June 2017 regarding premiums and deductions, employers may be able to begin funding insurance premiums by deducting amounts from their employees' payroll in July 2017.

Employers should also work with counsel to prepare written policies, or revise employee handbooks, to notify employees of the new payroll deduction, the new insurance coverage and their rights and obligations under the PFL Act. Employees, in turn, should confirm that their employers are providing the required coverage, that the deductions for the insurance premiums comply with the applicable regulations and that their employers have policies and procedures in place to enable employees to request paid family leave should they ever need it.

Until January 2018, the effective date of the PFL Act, employees who need leave to care for a new child, care for a close relative with serious health conditions or care for a close relative when another is called to active military duty, may be entitled to unpaid leave under FMLA and may be entitled to other benefits offered by their employers. ■

1. N.Y. Workers' Compensation Law §§ 200–242 (WCL).
2. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654.
3. Senator Kirsten Gillibrand, *The American Opportunity Agenda*, at 2, www.gillibrand.senate.gov/imo/media/doc/Gillibrand_Womens_booklet.pdf; Senator Gillibrand Announces Legislation to Provide Every American Worker with Paid Leave (March 18, 2015), www.gillibrand.senate.gov/newsroom/press/release/senator-gillibrand-announces-legislation-to-provide-every-american-worker-with-paid-leave; Council of Economic Advisers, *The Economics of Paid and Unpaid Leave* (June 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf.
4. See Council of Economic Advisers, *Economics of Paid & Unpaid Leave*.

5. Janet Walsh, *U.S. May Join the Rest of the World in Offering Paid Family Leave*, Human Rights Watch (March 19, 2015), www.hrw.org/news/2015/03/19/dispatches-us-may-join-rest-world-offering-paid-family-leave.
6. Katy Hall and Chris Spurlock, *Paid Parental Leave: U.S. vs. The World (INFOGRAPHIC)*, Huffington Post (Feb. 2, 2013), www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave_n_2617284.html; Human Rights Watch, *Failing Its Families: Lack of Paid Leave and Work-Family Supports in the US*, Summary of Report, <https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us>.
7. AB-908 Disability compensation: disability insurance (April 11, 2016), California Legislative Information, http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20150160AB908; New Jersey Temporary Disability Benefits Law, §§ 43:21-39.1, *et seq.* (2008); Rhode Island Temporary Disability Insurance—Benefits, § 28-41-35 (2013); <http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/LawsPolicies/FamilyLeave/default.asp>.
8. San Francisco was the first city to require fully paid family leave. Its law requires that employers make up the balance of the employee's pay beyond the amount covered by state law, and makes it illegal to fire an employee for taking parental leave. The San Francisco law took effect Jan. 1, 2017 for companies with 50 or more employees. <http://money.cnn.com/2016/04/06/news/economy/san-francisco-paid-parental-leave/index.html?iid=hp-stackdom>.
9. www.lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/Maternity/.
10. S. 786, 114th Cong. (March 18, 2015), Law Library of Congress, <https://www.congress.gov/bill/114th-congress/senate-bill/786/related-bills>; H.R. 1439, 114th Cong. (March 18, 2015), Law Library of Congress, <https://www.congress.gov/bill/114th-congress/house-bill/1439>.
11. *Id.*
12. New York St. B. Ass'n, *Memorandum in Support – NYSBA's Committee on Women in the Law Supports the Passage of the Family and Medical Insurance Leave Act: S786 of 2015 by Senator Gillibrand*, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=59878>.
13. *Id.*
14. S. 337, 115th Cong. (Feb. 7, 2017), Law Library of Congress, <https://www.congress.gov/bill/115th-congress/senate-bill/337/text>; H.R. 947, 115th Cong. (Feb. 7, 2017), Law Library of Congress, <https://www.congress.gov/bill/115th-congress/house-bill/947/related-bills>.
15. <https://www.whitehouse.gov/the-press-office/2017/02/28/excerpts-president-donald-j-trumps-address-joint-session-congress>.
16. WCL §§ 200–242.
17. 29 U.S.C. §§ 2601–2654.
18. WCL §§ 200–242.

19. WCL § 209(3)(b).
20. www.wcb.ny.gov/PFL/pfl-regis.jsp; www.dfs.ny.gov/insurance/rproindx.htm.
21. The information provided in this article is based on the PFL Act and the proposed rules, and is subject to change. Further, the information in this article is not legal advice. Persons seeking legal advice should consult with counsel concerning the applicability of any law to a particular situation.
22. WCL § 203; <https://www.ny.gov/programs/new-york-state-paid-family-leave> (a "private employee is someone who does not work for the State, any political subdivision of the state, a public authority or any governmental agency or instrumentality").
23. WCL § 203; 29 U.S.C. § 2611(2)(A).
24. WCL § 206(3)(a).
25. WCL § 206(3)(d).
26. WCL § 201(18).
27. WCL § 201(15).
28. New York State, *Paid Family Leave: Family Matters*, <https://www.ny.gov/new-york-state-paid-family-leave/helping-new-yorkers-need>.
29. WCL § 204(1), (2).
30. WCL § 206(4).
31. WCL § 205(2)(c).
32. WCL § 204(2); https://www.labor.ny.gov/stats/avg_wkly_wage.shtm.
33. WCL § 204(2).
34. WCL § 205(4).
35. WCL § 203-b.
36. WCL § 203-c.
37. WCL § 203-a.
38. WCL § 205(5).
39. WCL §§ 205(2)(b), 217.



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