**NEW YORK PAID FAMILY LEAVE LAW:
REGULATIONS FINALIZED AND LAW
TO TAKE EFFECT ON JANUARY 1, 2018**

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Last year, New York State enacted a law that will require employers to provide paid family leave benefits to eligible employees through the purchase of paid family leave insurance (the Paid Family Leave Law (“Law” or “PFLL”)). The Law will require employers to provide the leave beginning January 1, 2018, and the leave will be fully funded through employee payroll deductions. As of July 1, 2017, employers were permitted to start funding the purchase of the paid leave insurance by taking employee payroll deductions. Moreover, on July 19, 2017, the NY Workers’ Compensation Board finalized regulations (“Regulations”) that provide details regarding implementation of the PFLL.

This Alert summarizes the key aspects of the Law and Regulations.

**OVERVIEW OF THE LAW**

The PFLL is a series of amendments to the New York State Workers’ Compensation Law. It will require all New York employers to provide eligible full and part-time employees with paid, job-protected leave to care for a newborn or newly adopted or placed child, care for a family member with a serious medical condition, or deal with certain exigencies that arise when a family member is called to active military service. The Law will be phased in over a number of years, culminating in 2021 with a requirement to provide up to 12 weeks of paid leave at a rate of 67 percent of the employee’s average weekly wage (subject to a cap, as set forth below). The program will be funded entirely through employee payroll deductions; employers must purchase insurance (or self-insure) and thereafter the leave benefits will be paid by the insurance carrier.

**EMPLOYER COVERAGE AND FUNDING**

All private employers with at least one employee are covered by the Law. Such employers must provide paid family leave benefits to their employees by purchasing a paid family leave insurance policy or by self-insuring (and employers choosing to self-insure must receive permission to do so from the State). The premiums for the policy will be fully-funded through employee payroll deductions. The New York State Department of Financial Services (DFS) has set the maximum employee contribution rate at 0.126% of an employee’s weekly wage, not to exceed the New York State average weekly wage (“NYSAWW”). The NYSAWW currently is $1,305.92. Thus, the maximum employee contribution (i.e., deduction from paycheck) permitted for those making at least the NYSAWW is $1.65 per week. For employees making less than the NYSAWW, an employer may simply multiply the employee’s weekly wage by 0.126% to determine the appropriate deduction.

**EMPLOYEE ELIGIBILITY**

Employees who regularly work fewer than 20 hours per week will become eligible for paid family leave on their 175th day of employment. Employees who work 20 or more hours per week will become eligible for paid family leave on their 26th consecutive work week of employment.

Coverage is mandatory, so employees may not, with one exception, opt or waive out of the requirement to make contributions through payroll deductions. The one exception is that an employer must offer a waiver to any employee who will not work 26 consecutive weeks or 175 days in a 52-consecutive week period.

**IMPLEMENTATION TIMELINE**

The Law is scheduled to phase in over four years starting January 1, 2018, as set forth in the chart below. Employees will receive a portion of their weekly wages during the leave period, subject to a cap based on a percentage of the NYSAWW. For example, in 2018, employees may receive up to eight weeks of paid leave in any 52-week period at 50% of their average weekly wage, but in an amount not to exceed 50% of the NYSAWW. The NYSAWW, which is updated annually on July 1, currently is $1,305.92.

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| **Year** | **Weeks of Leave** | **% of Wages for those Below Cap** | **NYSAWW Cap %** |
| 1/1/2018 | 8 | 50% | 50% |
| 1/1/2019 | 10 | 55% | 55% |
| 1/1/2020 | 10 | 60% | 60% |
| 1/1/2021 | 12 | 67% | 67% |

When any employee takes family leave in daily increments, the employee’s maximum period of paid family leave is calculated based on the average number of days worked per week, with a maximum of 60 days per year for employees working at least five days per week. For example, a part-time employee working three days per week would be entitled to 60% of the maximum leave days.

Paid leave may be taken on an intermittent basis (less than a full workweek), in increments of one full day.

The 52-consecutive week period for determining how many days of leave the employee has remaining must be computed retroactively with respect to each day for which benefits are being claimed.

**USE OF PAID LEAVE**

Paid leave may be used (i) to provide care for a close family member with a serious health condition; (ii) to bond with a newborn during the first 12 months following the birth or adoption of the child, or to meet birth, adoption, or foster care obligations; and/or (iii) to attend to a qualifying exigency arising from the service of a family member in the military. Unlike the FMLA, the Law does *not* provide benefits for an employee’s own serious health condition.

Employees must provide notice of their intent to take leave 30 days in advance, or, where the leave is unforeseeable, as soon as practicable. Moreover, the employee is responsible for filing a claim for benefits with the employer’s insurance carrier or with the employer if it self-insures the benefits. The carrier or self-insured employer will process the claim and pay the benefits. The Regulations describe the type of documentation an employer or insurance carrier may request in determining whether the leave is for a qualifying event, including medical certifications.

**EMPLOYEE RIGHTS**

Employees are entitled to reinstatement at the conclusion of their leave, and employers may not retaliate against employees for use of paid family leave. Employers must also continue to provide health insurance to employees on leave, subject to the employee’s usual contribution to the cost of the premium.

**OTHER EMPLOYER OBLIGATIONS AND
INTERACTION WITH PAID TIME OFF AND OTHER LEAVES**

Employers must provide information to employees about paid family leave in an employee handbook or other written policy, including information on how to file a claim for paid leave. The employer must also post a written notice (to be issued by the State) concerning the PFLL.

Employers that wish to concurrently designate an employee’s FMLA leave and PFLL leave must notify the employee provide the employee with the notice required under the FMLA regulations. Absent the notice, the employee will be permitted to take the PFLL leave without concurrently using his or her FMLA leave.

Employers may allow employees to use vacation and personal leave, either instead of or together with PFLL, and receive full salary. Unless the leave also qualifies as FMLA leave, however, an employer may not require employees to use vacation or personal leave in this manner, unlike the FMLA which does permit the employer to require use of other paid leave. An employee may not take paid family leave during periods when the employee is collecting sick pay or paid time off from the employer. Note also that if an employer makes advance payments of the benefits, or makes payments to an employee of wages during a period of family leave, the employer may seek reimbursement from the carrier.

An employee is not able to receive both disability benefits and paid family leave benefits at the same time. An employee’s combined total disability leave and paid family leave in any 52-week period may not exceed 26 weeks.

**PUBLIC EMPLOYEES**

Although the program is mandatory for private employers, public employers may opt-in to the program. If the public employer’s employees are represented by a union, the opt-in must be bargained with the union.

**COLLECTIVE BARGAINING AGREEMENTS**

Employers subject to collective bargaining agreements may be relieved from providing paid family leave to employees covered by the agreement if the CBA provides benefits “at least as favorable” as those set forth in the Regulations. The CBA may not permit an employee to waive his or her right to paid family leave, but it may provide different rules related to the use of paid family leave from those provided in the Regulations. If the CBA does not provide different rules, the Regulations apply to the family leave benefits provided by the employer.

**PENALTIES AND REMEDIES**

Any dispute related to a claim for leave is subject to arbitration under Section 221 of New York Workers’ Compensation Law. A detailed arbitration process is outlined in the Regulations. The Regulations also provide for employer penalties, including: (a) if an employer fails to provide coverage, the employer is liable for a fine of up to 0.5% of weekly payroll for the period the employer was without coverage and a fine of up to $500; (b) if an employer fails to collect employee payroll deductions and fails to provide coverage, it will be directly liable to employees for the payment of family leave benefits and employee contributions for the period of the violation; and (c) employers that fail to provide health insurance while an employee is on leave will be directly liable for the employee’s medical costs while on leave.

Feel free to contact Evan Hudson-Plush at ehudson-plush@cwsny.com if you have any questions about the Law or Regulations.