

## Client Alert

### What New York Employers Need to Know About the State's New Paid Family Leave Law

February 7, 2018 – The New York Paid Family Leave Benefits Law (“NYPFL”) became effective on January 1, 2018. The law promises to be the most comprehensive of its kind, providing eligible employees with job-protected leave of up to eight weeks in 2018, and as many as twelve weeks by 2021. Paid family leave may be taken to bond with a newly born, adopted or fostered child (within the last 12 months), care for a family member with a serious health condition, or assist a loved one when a family member is deployed abroad on active military service.

Compensation to employees for such protected leave (wage replacement benefits) will be funded exclusively through payroll deductions. Eligible employees will earn 50% of their average weekly wage (“AWW”) in 2018, subject to a statutory cap (referenced as New York State’s Average Weekly Wage (“SAWW”) of \$1,305.92 per week) of **\$652.96 per week**. This coverage will increase up to 67% or the statutory cap by 2021, as set forth in the Benefits table below.

#### New York Paid Family Leave Benefits Increase Through 2021

Year	Maximum Weeks of Leave	Benefit
2018	8 weeks	50% of employee’s AWW, up to 50% of SAWW
2019	10 weeks	55% of employee’s AWW, up to 55% of SAWW
2020	10 weeks	60% of employee’s AWW, up to 60% of SAWW
2021	12 weeks	67% of employee’s AWW, up to 67% of SAWW

This Client Alert examines certain issues of which all New York employers should be aware as they comply with the new law and handle requests for paid leave.

**Coverage.** Paid family leave benefits are available to both full-time and part-time employees. Full-time employees, or those who are scheduled to work 20 or more hours per week, become eligible for benefits after 26 consecutive weeks of work. Part-time employees, or those who are

scheduled to work less than 20 hours per week, become eligible for benefits after 175 days worked in one 52-week period. The use of paid time off (vacation, personal days, sick days, etc.) counts towards the “consecutive weeks worked” or “days worked” thresholds, provided that the employee has contributed towards the cost of paid family leave benefits through his or her payroll deductions during that period. In addition, employees who hold more than one job and qualify based on the thresholds noted above may take paid family leave from both jobs so long as they do so with both employers concurrently.

**Opt-Out Waiver.** Employees who are not scheduled to work enough hours or weeks to qualify for paid family leave may opt out of paid family leave payroll deductions/contributions by completing this [waiver form](#). Employers *must* offer such employees an opt-out waiver in this circumstance.

**Paid Family Leave Insurance.** Most private employers will be required to obtain paid family leave insurance, which is generally added to an employer’s existing disability insurance policy. Employers who have not done so already should contact their disability insurance carrier immediately to add such coverage.

**Payroll Contributions.** Employers must also update their payroll processes to account for the receipt of employee contributions towards benefits to be provided by this insurance. The payroll contribution rate in 2018 is 0.126% of an employee’s weekly wage and is capped at an annual maximum of \$85.56. Employees earning less than the New York State Average Weekly Wage (\$1,305.92 per week), will have their annual contribution amount decreased from the cap of \$85.56, consistent with their actual weekly wages.

**Inform Your Employees.** Employers should update their relevant materials distributed to employees, including employee handbooks and manuals, to include the new paid family leave information. Employers that do not have a handbook or manual should provide written notification to employees regarding their new paid family leave benefits. It is also good practice to notify employees of the additional payroll deduction for paid family leave insurance, especially in light of other changes brought about by the implementation of the federal Tax Cuts and Jobs Act of 2017, so that employees may properly track the different withholdings and deductions from their paychecks. Insurance carriers will provide employers with a notice they can post in plain view, similar to the manner in which employers display notices for workers’ compensation and disability insurance.

**Taking Paid Family Leave Incrementally.** Employees may use up to eight weeks (40 days) of paid family leave in 2018. Such leave may be taken all at once or intermittently, but must always be taken in full day increments. Thus, an employee is entitled to use his or her paid family leave benefits for single days in a week if he/she so chooses. For example, a full-time employee is permitted to work three days a week and take two days of leave for twenty weeks. Unlike the federal Family and Medical Leave Act of 1993, there are no exceptions to the grant of NYPFL for highly compensated employees, nor is there any available “hardship” exception to NYPFL, permitting an employer to object to the manner in which an employee chooses to take available leave (be it when or in what increments it is taken).

**Calculation of Paid Family Leave Benefits.** As noted above, an employee receives 50% of his or her average weekly wage while taking paid family leave in 2018. This wage replacement benefit is paid by the employer’s disability benefits insurer, and is calculated by adding the

employee's wages for the eight weeks prior to the start of paid family leave, and dividing the total by eight. Where employees take intermittent paid family leave, the employer pays the employee his or her regular salary for the days such employee continues to work, while the insurer pays the employee 50% of the employee's average weekly wage for those days on which the employee is on leave. In the example above, where the employee takes two days of paid family leave for 20 weeks, the employer would pay 60% of the employee's weekly wages (for the three days worked), while the employee receives the balance, 50% of his or her average weekly salary for the two days of leave from the insurer. In other words, assuming that the employee's AWW was within the SAWW, the employee in question would receive one full day of pay for the two days he or she takes leave each week, in addition to the pay he or she receives from the employer for the three days worked.

**Interaction with FMLA Leave.** NYPFL and FMLA leave run concurrently, so long as the employer (i) properly notifies the employee that the time off is designated as leave under both laws; and (ii) provides the employee with the notice and certification forms required under FMLA. The [FAQs](#) on the NYPFL released by New York State give the example that, in 2018, if an employee is eligible to take twelve weeks of leave to care for a family member with a serious health condition, the first eight weeks would be classified as both paid family leave and FMLA, and the remaining four weeks would be classified as FMLA leave.

However, any FMLA leave taken in 2017 does not affect paid family leave eligibility for 2018, so long as the child was born, adopted or fostered within the last twelve months. Thus, where an employee only took FMLA leave in 2017, he or she would still be entitled to eight weeks of paid family leave in 2018 for the same birth, adoption or foster child placement. If the 2017 FMLA leave is partially taken in 2018 (*e.g.*, if the employee's FMLA straddled 2017 and 2018 into the first four weeks of January, then the employee could take only four more weeks of paid family leave (8 - 4 = 4).

Employers may charge an employee's accrued paid time off when it is concurrently designated as FMLA leave. Under the NYPFL, however, employees are permitted to choose whether or not to use their accrued paid time off or take paid family leave—they cannot take both.

**Conclusion.** New York employers will have to get up to speed quickly on eligibility and benefits calculation for the new NYPFL. Some concepts in the new law are breakthrough in nature, and employers should be conversant in both law and best practice associated with its implementation.

If you require any additional information concerning the New York Paid Family Leave and Benefits Law, or about any other employment-related issues, please contact:

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