

# Management Alert



## Proposed Regulations Issued for New York Paid Family Leave Law

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**Seyfarth Synopsis:** The Workers' Compensation Board issued proposed regulations for New York's Paid Family Leave Law ("PFL"). The regulations provide much needed guidance on many key areas of the law, including eligibility and uses for leave, notice requirements, and written policy requirements. The Notice and Comment period extends until April 10, 2017. PFL goes into effect on January 1, 2018.

New York's Paid Family Leave Law ("PFL") will be effective January 1, 2018. By 2021, when the law is fully phased in, it will provide eligible employees with up to 12 weeks of paid leave in a 52-consecutive week period. While on PFL, employees will be paid up to 67% of their average weekly wage or the state average weekly wage, whichever is less, under the statutory scheme. Further details about the law are available in our [prior alert](#).<sup>1</sup>

The Workers' Compensation Board recently issued [proposed regulations](#) that provide definitions and explanations for many of the key aspects of PFL, including, but not limited to, eligibility, notice for a foreseeable or unforeseeable qualifying event, and various employer obligations. The regulatory highlights follow.

### Eligibility and Uses for Leave

PFL provides that employees may take time off of work, up to a maximum of 12 weeks in a 52-consecutive week period, for the following reasons:

- To provide care for a covered family member when the family member has a serious health condition;
- To bond with his or her child the first year of birth or adoption; or
- For any "qualified exigency" under the federal Family Medical Leave Act ("FMLA"), where the covered family member is on active duty or has been notified of an order to resume active duty in the military.

The proposed regulations provide clarity on the statutory eligibility requirements set forth in the statute.

The proposed definition of to "provid[e] care" requires that the employee "be in close and continuing proximity to the care recipient. This means present at the same location as the family member during the majority of the employment period from which leave has been taken." This definition also includes travel to secure medication or to arrange care for the family member. It is further inclusive of various types of care, such as "necessary physical care, emotional support, visitation,

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<sup>1</sup> The proposed regulations clarify that an employer is permitted, but not required, to collect the weekly employee contribution on July 1, 2017 for paid family leave coverage beginning on January 1, 2018. The employee contribution amount will be set on or about June 1, 2017 and annually thereafter on September 1, 2017.

assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.”

A “serious health condition” is defined 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.

“Continuing treatment or continuing supervision” includes, among other things, a period of three or more consecutive, full calendar days during which a family member is unable to work, attend school, perform regular daily activities or is otherwise incapacitated due to illness, injury, impairment or physical or mental conditions, and any subsequent treatment or period of incapacity relating to the same condition under certain circumstances. The definition also includes any long term or permanent period during which a family member is unable to work, attend school or perform regular activities due to an illness, injury, impairment or physical or mental condition, so long as the family member is under the continuing supervision of a health care provider. “Continuing treatment and continuing supervision” also includes a period of time in which a family member is incapacitated due to a “chronic serious health condition” which is defined as a condition that requires periodic visits for treatment; continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity.

Excluded from the definition of “serious health condition” are cosmetic treatments unless inpatient treatment is required or complications develop. Similarly, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, etc., are also excluded.

Leave for purposes of birth, adoption, or foster care is also further explained in the proposed regulations. An employee may take family leave for the purposes of arranging placement for adoption or foster care, including counseling sessions, court appearances, meetings with a birth parent’s attorney or doctor, or travel to another country to complete an adoption, if absence from work is required for the placement for adoption or foster care to proceed. Eligibility for leave following a child’s birth or adoption or foster care placement begins on the date of the child’s birth or placement and expires at the end of the consecutive 52-week period following such birth or placement. Finally, the regulations clarify that an eligible employee may receive disability benefits or paid family leave benefits during the post-partum period, but not both at the same time.

## Defining “52-Consecutive Weeks”

The proposed regulations make clear that 52-consecutive calendar weeks must be computed retroactively with respect to each day for which benefits are claimed.

## Notice of the Need for PFL

To use PFL, notice to the employer must be given at least 30 days in advance of the date leave is to begin if the event is foreseeable. Foreseeable qualifying events are included in the proposed regulations: “an expected birth, placement for adoption or foster care,” “planned medical treatment for a serious health condition of a family member” or a “known military exigency.”

If the need for leave is not foreseeable, notice must be given as soon as practicable. Pursuant to the proposed regulations, “as soon as practicable” means “as soon as possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a qualifying event less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.” Failure to give proper notice for a foreseeable need for PFL may lead to partial denial of the claim for a period of up to 30 days from the date notice is provided.

As with other leave statutes, an employee is required to provide notice sufficient to put an employer on notice of the qualifying event and the anticipated timing and duration of leave, but need not expressly assert rights under PFL or even mention “family leave.”

Employees may make a claim for PFL by using the PFL-1 form issued by the Workers' Compensation Board. A draft form is currently available [here](#).

## Employer Obligations

### ***Written Policy and Posting Requirement***

An employer's disability benefits policy must provide paid family leave coverage as of the effective date of the law.

Further, employers must distribute written policies providing information about PFL, including how to file a claim, as well as conspicuously post a printed notice concerning PFL in a form prescribed by the Workers' Compensation Board. Such a notice has not yet been finalized.

Failure to provide coverage for PFL will lead to a penalty of .05% of the employer's weekly payroll for the period of such failure, and a maximum additional penalty of \$500.

### ***Employers Must Maintain Employee Health Coverage During Period of Leave***

Incorporating the FMLA's provisions, employers must maintain employees' health coverage while employees are on PFL. The proposed regulations clarify that an employee who is provided health insurance and who is normally required to make contributions to the cost of health insurance premiums must continue to do so while on leave. Any changes to the health plan or amount of premiums must apply equally to the employee on PFL, whether the change is to the advantage or the disadvantage of the employee. If an employee's share of the premium is 30 days late, the employer may discontinue coverage for the period of leave, upon 15 days' written notice. Further, if the employee's coverage lapses because payments were missed during the period while on PFL or because the employee did not elect to maintain coverage during leave, the employer must restore the employee to regular coverage/benefits equivalent to those the employee would have had if PFL was not taken and the payments were not missed, including coverage of family or dependents.

### ***No Prospective Waiver of Rights***

Generally, employees cannot waive their prospective rights under PFL and under no circumstances may an employer induce employees to waive any rights under PFL.

The proposed regulations do allow, however, employees whose regular work schedules are less than 26 weeks or 175 days in a 52-consecutive week period to file a waiver of family leave benefits. Employees who file a waiver do not have to make contributions to the cost of family leave benefits, and the employer will be similarly exempt from providing PFL to those employees. However, within 8 weeks of scheduling such an employee for a regular work schedule of 26 weeks or 175 days in a 52-consecutive week period, any waivers on file will be deemed revoked.

### ***Complaints of Failure to Reinstatement and Discrimination***

Under the law, an employee must be reinstated to the same or similar position that he or she left prior to taking PFL. The proposed regulations expand on this premise. In the event an employer refuses to reinstate the employee (who is otherwise eligible for reinstatement), an employee may file a formal request for reinstatement within 120 days of such refusal with the Workers' Compensation Board. Within the 30 days, the employer may take corrective action or respond to the request. Failing to respond may result in adverse findings and conclusions against the employer.

Following the employer's response, or thirty days after the due date for such response, the employee has two years to file a complaint under section 120 of the Workers' Compensation Law ("WCL"), which prohibits discrimination against employees who seek coverage under the law. The proposed regulations detail several "valid and legitimate" bases for the employer's failure to reinstate the employee: (1) the employee was ineligible to receive PFL at the time the claim was made; (2) the employee's position has been eliminated or over time had been decreased due to the needs of the business; and (3) the employee's claim for PFL was falsified.

## ***Collective Bargaining Agreements***

Employers of employees subject to a collective bargaining agreement (“CBA”) are only exempt from providing PFL if the CBA provides benefits at least as favorable as those set forth in the law. Except as otherwise permitted by the waiver provision described above, the CBA may not permit an eligible employee to opt out of PFL.

## **Implications for Employers**

Employers should prepare to revise their written policies and due to the State’s widely publicized announcement about PFL and the [recent FAQs posted](#), may receive questions from employees in advance of implementation. We will continue to track the proposed regulations as they reach final rule status, and advise of any updates, including when PFL-1 is finalized.

If you would like further information, please contact your Seyfarth attorney, [Gena Usenheimer](#) at [gusenheimer@seyfarth.com](mailto:gusenheimer@seyfarth.com), or [Meredith-Anne Berger](#) at [mberger@seyfarth.com](mailto:mberger@seyfarth.com).

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