

April 26, 2016

New York State to Mandate Paid Family Leave, Increase Minimum Wage

In a move that will have far-reaching implications for all New York employers, on Monday, April 4, 2016, Governor Cuomo signed into law budget legislation that will create a paid family leave entitlement for workers across the state and gradually increase New York's minimum wage to \$15 per hour.

The Paid Family Leave ("PFL") provisions of the new law will expand New York's disability insurance regime to eventually provide up to 12 weeks of job-protected, paid leave to workers. The PFL law will be administered by the Workers Compensation Board, and wage replacement benefits will be provided to qualifying employees through state-regulated insurance programs that are funded by deductions from employee pay, much as statutory short-term disability benefits are funded today. Although portions of the statute are superficially similar to either the federal Family and Medical Leave Act ("FMLA") or New York City's Earned Sick Time Act, the new state law provides different employee eligibility requirements, permits employees to take job-protected leave in more circumstances, and applies to a far greater number of New York employers.

Based on the text of the statute, employers will begin deducting and submitting employee contributions for PFL benefits in January 2018, based on rates to be announced by the Superintendent of Financial Services no later than June 1, 2017. When PFL benefits become available, family leave benefits will be paid by the Workers Compensation Board to the employee starting from the first full day when family leave is required; the first payment may issue within fourteen days, and subsequent payments will issue within four business days of the filing of required proof of claim, and subsequently biweekly. No initial decision by the Board is required by payment to issue, but the employee may be required to provide a statement of the need for family care by an authorized health care provider. The regulations will provide a mechanism for employers or carriers to object to the employee's receipt of PFL benefits; among other things, Employees receiving PFL benefits may be required, at the request of the employer or carrier, to submit to medical examinations no more frequently than once per week to continue to be eligible to receive benefits.

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The PFL program is scheduled to begin in January 2018, with eligible employees permitted to take 8 weeks of leave and receive payments of up to 50% of the employee's average weekly wage, capped at 50% of the state average weekly wage. The benefits provided under the law will increase incrementally each year, and by 2021 the program will provide 12 weeks of leave paid at up to 67% of an employee's salary, capped at 67% of the state average weekly wage. Employees will also be able to use PFL benefits intermittently, in increments of a single day or 20% of the employee's weekly benefit rate. Use of state PFL and disability benefits will be subject to a combined maximum of 26 weeks (the current maximum entitlement for state disability benefits) in a consecutive 52-week period. Employers will also be permitted to provide employees with the option of using accrued vacation and paid time off and receiving full pay concurrently with their PFL, or only receiving the reduced-wage PFL benefits.

Beginning in 2018, employees will be entitled to PFL benefits after 26 consecutive weeks of employment – or on the 175th day of employment for employees who work a part-time schedule – with a “covered employer” (defined by the state's disability insurance laws to reach almost all entities that employ one or more individuals on at least thirty days in any calendar year). Employees will be able to use paid family leave:

1. to participate in providing physical or psychological care for a family member with a serious health condition;
2. to bond with a child during the 12 months following the birth, adoption, or foster care placement of the child; or
3. for any “qualifying exigency”, as defined by the FMLA, arising out of the fact that a spouse, domestic partner, child, or parent is called (or has been notified of an impending call) to active military service.

“Family member” is defined more broadly under the PFL law than under the FMLA, with the state extending protections to employees who care for children, parents (including in-laws, unlike the FMLA), spouses, domestic partners, grandchildren, and grandparents. Employees will be required to provide employers with 30 days advance notice when their need to take PFL is foreseeable, or as soon as practicable where the need for leave is not foreseeable.

Employers will be required to continue an employee's health benefits during PFL, as many are now required to do under the FMLA, and upon the completion of the PFL must return the employee to the same or a “comparable” position with no loss of previously-accrued benefits. Whereas the FMLA limits the aggregate amount of leave that two spouses employed by the same employer may take within a single 12-month period, PFL imposes no such limitation on the overall amount of leave each employee may take, but employers may prohibit employees from using the same

period of leave to care for the same family member. The new law also protects employees from discrimination or retaliation for exercising or attempting to exercise their rights under the PFL program.

Under the PFL law, an employee must use available FMLA benefits concurrently with any PFL unless otherwise expressly permitted by the employer. The law does not directly address situations where an employee uses PFL for a purpose that is not permitted under the FMLA (e.g., to care for a grandchild who has a serious health condition), but employers will presumably not be permitted to count such uses of PFL against an employee's FMLA entitlement. Similarly, if an employee is not eligible for FMLA leave at the time he or she uses PFL (which has a lower eligibility threshold for both employers and employees), but later becomes eligible, the prior PFL use presumably could not be counted against the employee's subsequently-acquired FMLA entitlement. Consequently, it appears at this time that employers will be best served by tracking FMLA and PFL use separately, in the event that an employee's planned use of leave qualifies under only one of the two laws.

The budget law also gradually increases the minimum wage for covered New York employees beginning at the end of 2016. Employers with 11 or more employees will be required to pay covered New York City employees a minimum wage of \$11 per hour beginning December 31, 2016, increasing in \$2 increments to \$15 by the end of 2018. Employers with 10 or fewer employees will be subject to a New York City minimum wage of \$10.50 per hour beginning December 31, 2016, increasing in \$1.50 increments to \$15 by the end of 2019. Covered employees in Nassau, Suffolk, and Westchester Counties will be entitled to a minimum wage of \$10 per hour beginning at the end of 2016, increasing in \$1 increments to \$15 by 2021. Employees outside of these jurisdictions will be entitled to receive a minimum wage of \$9.70 per hour beginning December 31, 2016, which will increase by 70 cents each year to \$12.50 by the end of 2020, and later increasing to \$15 at a rate to be determined by the Budget Division Director in consultation with the Department of Labor.

In advance of the commencement of the PFL program in 2018, New York employers will need to review and revise their leave policies, ensure proper coverage for employees' PFL insurance, and update their payroll systems to ensure that the correct deductions are made from employee pay. The text of the statute leaves many open questions, among them how PFL should be reconciled with paid sick leave under New York City's Earned Sick Time Act; and how the Workers Compensation Board will implement the system for processing claims and issuing payments. The New York Workers Compensation Board is authorized to issue regulations interpreting and implementing the new law, and we may hope that such regulations will provide needed clarity and guidance for employers. The Firm will continue to monitor the Board's publications for any developments in this regard.

If you have any questions or would like detailed information about New York's new Paid Family Leave law or minimum wage increases, please contact Nick Bauer at (212) 758-7793 or any other attorney at the firm.

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