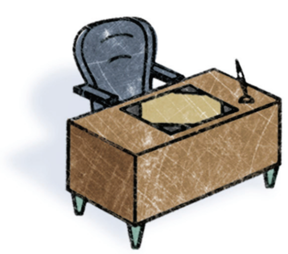
PHILLIPS LYTLE LLP ALERT
FOR BNHRA MEMBERS
LABOR & EMPLOYMENT
SEPTEMBER 2017



New York's Paid Family Leave Program Will Require Employers to Update Their Leave Policies

In 2016, Governor Cuomo signed the Paid Family Leave program ("PFL"), to take effect on January 1, 2018. The law shares several broad similarities with the federal government's Family and Medical Leave Act ("FMLA"); some of the distinctions, however, will require employers to update their policies regarding leave.

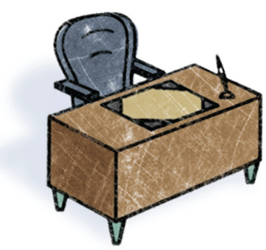
The PFL and FMLA (collectively, "Acts") are similar in that they both provide a leave of absence for eligible employees as a result of a family member's "serious health condition," the birth or adoption of a child, or military service. The Acts protect employees against termination for taking this leave and require that employers maintain employees' health insurance benefits, though they do not mandate that either seniority or other benefits accrue during the leave period. Both Acts require that employees give their employers notice and adequate medical certification. The Acts both require that they run concurrently, unless the employer allows for an alternative arrangement, or one of the requirements for either the FMLA or PFL is not met.

Differences between the FMLA and PFL

There are some important distinctions between the Acts. The FMLA covers public and private employers with 50 or more employees in a 75-mile radius, as well as employees of such companies who are employed for at least 12 months with a minimum of 1,250 hours in that 12-month period. The PFL stands in stark contrast to this by covering **all** private employers with one or more employees on each of at least 30 days in a calendar year. Employees of such companies will become eligible after 26 weeks of employment, or 175 days for employees working less than 20 hours per week. Public employees under the PFL may receive benefits if the employer opts to provide the benefits, or if they are collectively bargained for.

The PFL represents a vast increase in the number of covered employers when compared to the FMLA. However, employees who are ineligible for paid family leave benefits, because they are not scheduled to work for at least 26 consecutive weeks or will not work 175 days in a 52-consecutive-week period, may sign a waiver opting out of PFL benefits. Employers must offer the waiver to such ineligible employees. A waiver is automatically deemed revoked within eight weeks of any change to an employee's regular work schedule that requires the employee to continue working for 26 consecutive weeks or 175 days in a 52-consecutive-week period. In such an event, the employee must begin making premium contributions and pay any retroactive premiums from the date of hire as soon as the employee is notified of such obligation. An ineligible employee who does not sign a waiver must make premium contributions.

The next departure from the FMLA is that PFL provides for paid leave, whereas the FMLA grants unpaid leave (note that the FMLA allows employers to require that employees substitute paid time off for unpaid FMLA time). The PFL provides paid leave at rates based on the percentage of the employee's average weekly wage, or the



state average weekly wage (whichever is less), starting with 50 percent on January 1, 2018, and eventually reaching 67 percent by 2021. The FMLA counts the amount of time taken off in hours, whereas the PFL requires whole days to be taken off. The number of weeks of leave under the PFL will increase yearly, beginning with eight weeks on January 1, 2018, and ending with 12 weeks in 2021.

The conditions of leave under the FMLA and PFL are generally the same, though there are several provisions in the PFL that do not mirror the FMLA. The FMLA covers an employee's treatment of his or her own qualifying health condition; the PFL does not make such a provision. The PFL broadens the range of people defined as "family"; it covers children (including those over the age of 18, who are not covered by the FMLA), parents-in-law, domestic partners, grandparents and grandchildren. These inclusions depart from the FMLA, which only covers these individuals in cases where the employee is acting *in loco parentis* – usually this would only cover grandparents or grandchildren. (Consequently, employees could "stack" FMLA and PFL, for example, taking 12 weeks off to care for an ill parent under the FMLA, followed by another 12 weeks to care for an ill grandparent under the PFL.)

The 12-month period in which an employee may use benefits may also be measured differently under FMLA and PFL. Under FMLA, an employer may choose whether the 12-month period is comprised by the calendar year; any fixed 12-month period, such as a fiscal year or an employee's anniversary date; the 12-month period measured forward from the first date an employee takes FMLA leave; or a "rolling" 12-month period measured backward from the date an employee used FMLA leave. On the other hand, PFL calculates the period using the "rolling" 12-month period measured backward from the date an employee used FMLA leave.

Under PFL, employers may choose whether to pay the premiums annually, forward-looking or quarterly, in arrears. Each employer should consult with its insurance broker to determine the best option, but employers may consider making payments quarterly in arrears, as it could simplify recordkeeping and any possible refund of deductions.

Advice to Employers

Employers that are covered by the PFL will need to post a conspicuous notice for their employees informing them that they are covered by the PFL and must provide written guidance to employees concerning their rights and obligations under the PFL. Handbooks and policies will need to be updated to accommodate the increase in eligible employees and new requirements under the PFL. Employers should state in their employee handbooks and relevant policies that FMLA and PFL will run concurrently, to the extent possible.

Employers should adopt the same 12-month period for both FMLA and PFL. Finally, employers may wish to utilize the upcoming open enrollment benefit windows as an opportunity to explain PFL.

Additional Assistance

For more information regarding how leave policies will be affected by PFL, please contact any of the attorneys on our Labor & Employment Practice Team. ■

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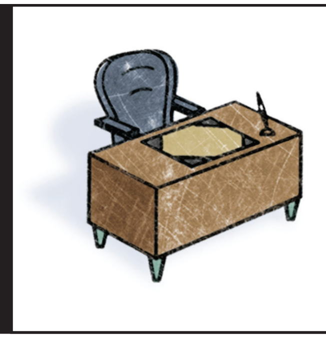

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