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NY Employers Take Note: **Paid Family Leave Benefits Law** Becomes Effective Jan. 1st

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On Jan. 1, 2018, the New York Paid Family Leave Benefits Law (NYPFL) takes effect throughout New York for private-sector employers. The NYPFL, which was signed into law by Gov. Andrew Cuomo and finalized by the New York Worker's Compensation Board (WCB) in July 2017, guarantees job-protected paid time off to almost every full-time and part-time private-sector New York employee. Lisa Nagele-Piazza, "New York Paid-Family-Leave Final Regulations Are Available to Employers," Soc'y for Human Resource Mgmt. (Aug. 1, 2017).

In enacting the NYPFL, New York joined California, Rhode Island and New Jersey as the only states in the nation that provide paid fam-

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ily leave benefits; however, once fully implemented, the NYPFL will be the most comprehensive paid family leave law in the nation. State of N.Y., "Paid Family Leave: How It Works" (last visited Sept. 27, 2017). New York private-sector employers must adhere to the NYPFL's

mandates (including its employee notice provisions) no later than Jan. 1, 2018. Therefore, it is paramount that employers make sure they are prepared to comply with the NYPFL prior to that date. This article describes the NYPFL and its requirements, and recommends

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steps that New York employers can take to comply with the law by January 1.

Eligible Employees

Virtually every full-time and part-time private-sector employee who works in New York will be eligible for benefits under the NYPFL, depending upon their length of service. *Id.* Full-time private-sector employees, or those with a regular work schedule of 20 or more hours per week, become eligible to receive benefits under the NYPFL after 26 weeks of employment. Part-time private-sector employees, or those who work less than 20 hours per week, become eligible for NYPFL benefits after 175 days of employment. *Id.* Freelancers and independent contractors, among other categories of workers, are not covered by the law and are thus not eligible to receive NYPFL benefits. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave" (last visited Sept. 27, 2017). Other categories of exempted workers include volunteers, livery drivers, black car operators, recipients of charitable aid, and teachers. *Id.*

Employee Benefits Provided by the NYPFL.

Once effective, the NYPFL will provide three primary benefits to eligible employees: (1) paid

leave, provided the reason for the leave is covered by the law; (2) job protection upon return from paid leave; and (3) continuation of health insurance during paid leave.

Paid Leave. Beginning on Jan. 1, 2018, the NYPFL will entitle eligible employees to 8 weeks of paid leave, paid at either: (1) 50 percent of the employee's average weekly wage, or (2) 50 percent of the New York State Average Weekly Wage (NYSAWW), whichever is less. *Id.* The NYSAWW is computed for each calendar year by the New York State Department of Labor, and is currently \$1,305.92. N.Y. Dep't of Labor, "New York State

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Average Weekly Wage (NYSAWW)" (last visited Sept. 27, 2017). Both the length of the NYPFL's leave allocation and required wages for paid leave are set to increase each year until 2021, as follows:

- Jan. 1, 2019: 10 weeks of paid leave, paid at the lesser of 55 percent of the employee's average weekly wage or NYSAWW;
- Jan. 1, 2020: 10 weeks of paid leave, paid at the lesser of 60 percent

of the employee's average weekly wage or NYSAWW;

- Jan. 1, 2021: 12 weeks of paid leave, paid at the lesser of 67 percent of the employee's average weekly wage or NYSAWW.

Employers may not require employees to take all available sick or vacation leave before using NYPFL leave, but may permit employees to supplement NYPFL benefits up to their full salary amount with accrued paid time off during NYPFL leave. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," *supra*.

Eligible employees may use NYPFL leave in any of three specific situations: (1) to provide physical or psychological care to a family member who is in "close and continuing proximity" to the employee due to the family member's serious health condition; (2) to bond with a newborn child during the first year of the child's life, or with a newly placed adopted or foster child during the child's first year of placement; and (3) for any qualifying reason as provided for under the Family and Medical Leave Act (FMLA) arising from the employee's spouse, domestic partner, child or parent being on active military duty, or being notified of an impending call to active military duty. ("Family member" is not defined by applicable regulations adopted by the New York

Workers' Compensation Board, but the state has noted that the term includes spouses, domestic partners, children, parents, parents-in-law, grandparents, and grandchildren. A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential health care facility; or (2) continuing treatment or continuing supervision by a health care provider." "Paid Family Leave: How It Works," supra. Employers may require employees to use NYPFL leave concurrently with leave provided by other statutes, such as the FMLA. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Job Protection. Employers are required to reinstate an employee returning from leave under the NYPFL to either: (1) his or her prior position; or (2) a comparable position with comparable pay, benefits, and other terms and conditions of employment. State of N.Y., "New York State Paid Family Leave: Employers" (last visited Sept. 27, 2017). Additionally, employers are prohibited from discriminating or retaliating against employees who use leave to which they are entitled under the NYPFL. N.Y. Workers'

Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Health Insurance Continuation. Employers are also prohibited from discontinuing health insurance coverage for employees who are out on paid leave pursuant to the NYPFL. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra. However, employers may ask that employees continue to pay any health plan premiums throughout the duration of leave. *Id.* In the event that an employer's health plan or benefits change while an employee is using NYPFL leave, the employee on leave is entitled to the new plan or benefits. *Id.*

NYPFL Benefit Funding

NYPFL leave is intended to be fully employee-funded through payroll deductions, and regulations promulgated by the WCB require all insurance carriers who provide short-term disability benefits to also provide NYPFL benefits. State of N.Y., "Paid Family Leave: How It Works," supra; N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra. The New York Department of Financial Services has determined that maximum employee contributions for NYPFL coverage will be set at 0.126

percent of an employee's weekly wage, up to and not exceeding the statewide average weekly wage. N.Y. State Dep't of Fin. Servs., "Decision on Premium Rate for Family Leave Benefits and Maximum Employee Contribution for Coverage Beginning January 1, 2018" (June 1, 2017). An employer's failure to provide coverage for NYPFL leave benefits may result in the imposition of a fine equal to 0.5 percent of the employer's weekly payroll for the period of such failure, along with a separate penalty not to exceed \$500. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Employer Notice Obligations

The NYPFL explicitly obligates employers to provide employees with clear notice of their rights under the law. *Id.* Employers who maintain written guidance regarding employee benefits and rights, including employee manuals, handbooks or policies, must include "information concerning leave under [the NYPFL] and employee obligations under [the NYPFL]" in those materials. *Id.* Employers without handbooks or similar documents must provide stand-alone written guidance of employee rights and obligations under the law. *Id.* Finally, employers must display or post a printed notice concerning employee

rights under the NYPFL, which may be obtained from a disability insurance carrier, “in plain view where all employees and/or applicants can readily see it.” *Id.*

Recommendations For Compliance

There are several steps that New York employers can take to become compliant with the NYPFL by Jan. 1, 2018. As an initial matter, employers who have not already done so should contact their disability insurance carriers to understand the terms of the insurer’s NYPFL coverage and confirm the cost of related premiums in order to determine the proper timing and amount of employee payroll deductions. Unionized employers should also contact appropriate union representatives in order to obtain authorization to begin making payroll deductions as necessary, including communicating any proposed deduction amounts. Once the calculation and method of NYPFL-related payroll deductions has been established, New York employers should obtain, distribute, and collect completed versions of any necessary forms provided by their disability insurance carriers.

Employers should additionally prepare to provide proper notice to their employees of their rights and obligations under the NYPFL. For instance, employers

who maintain written policies regarding benefits should be sure to adopt a NYPFL policy for inclusion in those materials. Employers without handbooks or similar materials should prepare a stand-alone policy regarding employee NYPFL rights and obligations for distribution beginning Jan. 1, 2018. Finally, all employers with eligible employees should obtain the required printed notice concerning the NYPFL from their disability insurance carriers, and prominently post them.

Most significantly, employers should prepare for lengthier or new employee leave requests in 2018 and beyond. As an initial matter, many employees who would already be eligible for several weeks of leave under other statutes—most notably, the FMLA—will also be entitled to an additional eight weeks of paid leave under the NYPFL, which will not run concurrently unless the employer maintains a policy to this effect. Additionally, many employers who are not covered by other leave statutes will now be required to prepare for, provide and account for the paid leave required under the far less restrictive terms of the NYPFL. Preparation for new or increased employee leave should also include thorough communication to management, including in the form of training, regarding how to

administer leave and how to avoid actual or perceived discrimination on the basis of NYPFL leave use.

While the NYPFL may impose new or unfamiliar obligations upon New York employers, compliance with the law’s requirements by Jan. 1, 2018 is essential. Fortunately, regulations adopted by the WCB provide useful guidance for employers, who also have valuable compliance allies in existing disability insurance carriers. Employers should ensure that payroll deduction programs are in place and that they have properly communicated the rights and obligations imposed by the NYPFL to their employees by Jan. 1, 2018. Additionally, employers should review existing leave policies and understand how potentially extended leaves will affect their workforce. With a thorough plan of action in place, New York employers both can and should be prepared for the NYPFL to take effect on the first day of the new year.