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HR CONNECTION

More paid family leave questions than answers for employers

As you may recall, on April 4, 2016, Gov. Andrew Cuomo signed legislation resulting in New York state providing the most comprehensive and progressive family leave program in the nation. From that point, it became the responsibility of the state's Department of Financial Services ("DFS") and Workers' Compensation Board ("WCB") to draft and finalize regulations ahead of the Jan. 1, 2018, effective date.

Unfortunately, with six-plus months to go before the first employee can take Paid Family Leave ("PFL"), there remain far more questions than answers about how employers should prepare for PFL. Although DFS published their final regulations on June 1, setting the employee contribution rate as a percentage of the employee's weekly wage, the WCB appears weeks or months away from any final regulations. Once again, employers are likely to be left scrambling to understand the regulations and their related responsibilities, finalize company policies and procedures, and explain the new benefit to employees.

The Paid Family Leave Law ("PFL") applies to all private-sector employers with one or more employees in the state. This is a critical point because, of the 451,000 small businesses in New York, more than 80% employ fewer than 10 workers. Flower shops, diners, dry cleaners, accounting firms, landscapers, candy stores, and many more will all be affected. Having talked to dozens of these employers over the last few weeks I've learned that most don't know anything about PFL. And the few employers that remembered hearing about it incorrectly assumed the PFL will not apply to them because their businesses are too small.

That was the case with one of my favorite pizza shops. The owner and I always talk while I'm waiting for my order, and last



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Thursday was no exception. After mentioning I had spent most of the day presenting information on paid family leave to over 200 small employers, he laughed and said he was glad it didn't apply to his business. I left 30 minutes later with a free pizza and a new client.

On July 1, 2017, employers may begin payroll deductions equal to 0.126% of the employee's weekly wage, up to a maximum deduction of \$1.65 per week, (0.126% of the New York State Average Weekly Wage ("NYSAWW"), currently \$1,305.92). For example, an employee paid \$500.00 for the week will have a contribution of \$0.63 (\$500.00 x 0.126%) deducted from their pay. While an employee paid \$1,500.00 for the week will have the maximum contribution of \$1.65 (\$1,305.92 x 0.126%) deducted from their pay.

PFL will be implemented in four stages for eligible employees:

- Jan. 1, 2018, PFL is set at up to eight weeks of paid leave at 50% of the employee's average weekly wage, to a maximum of 50% of the NYSAWW.
- Jan. 1, 2019, PFL increases, going up to 10 weeks of paid leave at 55% of the employee's average weekly wage, to a maximum of 55% of the NYSAWW.
- Jan. 1, 2020, PFL time off remains at up to 10 weeks, but the benefit increases to 60% of the employee's average weekly wage, to a maximum of 60% of the NYSAWW.
- Jan. 1, 2021, PFL is fully implemented at up to 12 weeks of paid leave at

67% of the employee's average weekly wage, to a maximum of 67% of the NYSAWW.

Employees regularly working 20 or more hours per week are eligible for PFL benefits after 26 consecutive weeks of employment. Employees regularly working less than 20 hours per week are eligible for PFL benefits after working a total of 175 days in a 52-week period. Employees who work 20 or more hours per week, but will not work 26 consecutive weeks, and employees working less than 20 hours per week, but will not work at least 175 days in a 52-week period may file a waiver excluding them from PFL benefits and the associated weekly payroll deductions.

Leave designated as PFL may be taken in weekly or full-day increments. Employees taking PFL in daily increments (regardless of the hours worked per week) will be eligible for a maximum period of PFL based on the average number of days the employee works per week. Further, an employee may not take more than a combined total of 26 weeks of disability benefits and PFL benefits during the same 52-week period.

In most cases, employers may allow — but not require — employees receiving PFL benefits to use available paid time off ("PTO") in order to receive their full pay while on leave. However, employers covered by the federal Family and Medical Leave Act ("FMLA") can require the use of available PTO in some situations. Under the most recent version of the proposed PFL regulations, if a period of PFL is designated by the employer to run concurrently with FMLA, and the employer has a policy requiring employees to use available PTO while on FMLA leave, then the employer may require an employee to use their available PTO and

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receive their full pay during the leave. In both cases, if the employee receives their full pay while on PFL, the employer may request reimbursement of PFL benefits included in the employee's pay by filing a claim for reimbursement with the carrier before the benefit payment is made to the employee.

Employers should note that the employee must be notified of the FMLA designation using the methods provided in the PFL and FMLA. Otherwise the designation will be invalid and the employee will receive PFL benefits without concurrently using FMLA

leave. In addition, if the employer notifies an employee that a period of designated FMLA also qualifies under the PFL, and the employee fails to apply for PFL benefits, the employer (and its insurance carrier) may count the leave as FMLA and PFL.

Unfortunately, this is only a fraction of what employers will need to know to prepare for and implement PFL in their companies. Stay tuned, with the comment period for the most recent proposed regulations open until June 24, there are bound to be more changes, and many more articles on Paid Family Leave.

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