

STROOCK SPECIAL BULLETIN

New York Paid Family Leave Law Takes Effect on January 1, 2018

December 4, 2017

On January 1, 2018, virtually all employers in New York will be required to provide Paid Family Leave to their employees.

Covered Employers/Employees

All private employers (*e.g.*, person, partnership, association) that have at least one or more employees on each of at least thirty (30) days in a calendar year are required to provide this benefit. In addition, employers of domestic employees who work at least forty (40) hours per week, will also be required to provide the benefit. Public employers may elect to become covered *solely* for the purpose of family leave benefits, provided employees who are not represented by a union are given ninety (90) days' notice. A public sector union, as part of the collective bargaining process, may opt into paid family leave benefits on behalf of those employees it represents.

To be eligible for paid family leave benefits, employees who are regularly scheduled to work twenty (20) hours or more per week must have worked for twenty-six (26) weeks. Employees who are regularly scheduled to work less than twenty (20) hours per week become eligible after 175 days of work.

Qualifying Events

Employees may take leave:

- to participate in providing care, including physical or psychological care, for a family member of the employee made necessary by a serious health condition of the family member;
- to bond with the employee's child during the first twelve months after the child's birth, or the first twelve months after the placement of the child for adoption or foster care with the employee; or
- because of any qualifying exigency as interpreted under the family and medical leave act, arising out of the fact that the spouse, domestic partner, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces of the United States.

The amount of the paid family leave benefit is to be phased in over time. For 2018, eligible employees may take a maximum of eight (8) weeks at 50% of their average weekly wage, up to a

maximum of \$652.96 per week (this amount represents 50% of the state average weekly wage).¹

Family leave benefits are to be paid through employee contributions, although employers may elect to pay for it themselves. In 2018, employees will contribute through payroll deduction 0.126% of their weekly wage, up to the annualized state average weekly wage. The maximum weekly deduction in 2018 is \$1.65.

Job Protection and Medical Benefit Continuation

Like with the federal Family and Medical Leave Act (“FMLA”), which covers employers with fifty (50) or more employees within a seventy-five (75) mile radius, employees are entitled to be reinstated to their same or a comparable job upon their return from Paid Family Leave. A failure to reinstate employees to their same or comparable job may leave employers exposed to discrimination and/or retaliation claims. In addition, as with the FMLA, employers must continue an employee’s health insurance as if he or she were not on leave during the Paid Family Leave. This means, for example, that employers may require employees to continue to pay their share of premium costs while on Paid Family Leave.

Interface with FMLA

There is considerable overlap between FMLA and Paid Family Leave qualifying events. A key difference, however, is that Paid Family Leave **excludes** the employee’s own serious health

condition. Therefore, employees can aggregate—that is, add together—FMLA (*e.g.*, six (6) weeks of disability due to pregnancy or birth) and Paid Family Leave (*e.g.*, eight (8) weeks of Paid Family Leave for child bonding in 2018). This would also apply to births and placements that occurred in 2017, including for employees who already took FMLA leave for the same qualifying reason in 2017. So, for example, if an employee took a full twelve (12) weeks of FMLA in 2017 for the birth or placement of a child, that employee may be eligible for an additional eight (8) weeks of Paid Family Leave in 2018. Therefore, employers should be prepared for leave requests and potential staffing gaps.

Penalties

Employers who fail to comply with the Paid Family Leave Benefits Law may be assessed a fine equal to 0.5% of their weekly payroll for the period they are without coverage, plus an additional amount up to \$500. In addition, employers who fail to collect employee contributions remain liable for payment of the Paid Family Leave benefit and waive their right to collect missed employee contributions. Finally, employers who fail to maintain health insurance coverage for employees on Paid Family Leave are fully liable for the employee’s medical costs during the period of leave.

The Takeaway

Employers should think of Paid Family Leave as an insurance benefit that augments the FMLA for those employers covered by FMLA. Small employers not covered by the FMLA will now be required to provide job-protected leave.² As noted above, however, while there are many similarities between New York’s Paid Family Leave Law and the FMLA, there are some significant differences. Employers should consult with employment

¹ In 2019, eligible employees are entitled to 10 weeks of paid family leave at 55% of their average weekly wage, capped at 55% of the state average weekly wage. In 2020, the benefit remains at 10 weeks but the pay amount increases to 60% of the employee’s average weekly wage capped at 60% of the state average weekly wage. These amounts increase again in 2021, when eligible employees will be entitled to 12 weeks of paid family leave at 67% of their average weekly wage, capped at 67% of the state average weekly wage.

² While there are many similarities between New York’s Paid Family Leave Law and the FMLA, there are also some key differences. Employers should consult with employment counsel to draft a Paid Family Leave policy.

counsel as they craft policies to implement the Paid Family Leave Law. Employers may obtain paid family leave coverage through their disability coverage provider, as the law requires all policies of insurance issued pursuant to the New York State Disability Law to offer coverage for both disability and family leave benefits, or they may choose to self-insure.³

Employers are also required to post notice that includes an explanation of the employees' rights and obligations. These notices are available through the employer's insurance carrier or, for those employers who are self-insured, through the Workers' Compensation Board.

Finally, employers will need to revise their Employee Handbooks to include a Paid Family Leave Policy or, in the absence of an Employee Handbook, issue a stand-alone Paid Family Leave Policy.

Please feel free to contact one of the Stroock employment lawyers for assistance with ensuring compliance with the Paid Family Leave Law.

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³ The deadline for employers to register self-insure for 2018 has passed (employers were to have registered with the State by September 30, 2017). Employers who self-insure Short-Term Disability who have not registered to self-insure Paid Family Leave can purchase a separate Paid Family Leave policy.

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