

# New York's Paid Family Leave Law: Is your company ready?

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Employers take note: New York's Paid Family Leave Law, or NYPFL, will change the benefits landscape for many employers. Beginning Jan. 1, 2018, nearly every private-sector employer in the state will need to offer paid family leave to eligible employees.

Paid leave is not the only new benefit for employees. The law also provides reinstatement rights to employees who take qualifying leave and creates new recordkeeping and notice requirements for employers, among other things. Accordingly, employers should update their employment policies and take steps to ensure they are ready to comply with the law.

## WHAT BENEFITS ARE PROVIDED?

As of Jan. 1, 2018, eligible employees will be entitled to eight weeks of paid family leave within a 52-week period. While on paid family leave, employees receive either 50 percent of their average weekly wage or 50 percent of the New York state average weekly wage as published by the state Department of Labor, whichever is less.

These paid leave benefits increase over a four-year period. The full benefits schedule is as follows:

- Beginning Jan. 1, 2018, eight weeks of leave paid at 50 percent of the employee's average weekly wage or 50 percent of the state average weekly wage, whichever is less.
- Beginning Jan. 1, 2019, 10 weeks of leave paid at 55 percent of the employee's average weekly wage or 55 percent of the state average weekly wage, whichever is less.
- Beginning Jan. 1, 2020, 10 weeks of leave paid at 60 percent of the employee's average weekly wage or 60 percent of the state average weekly wage, whichever is less.
- Beginning Jan. 1, 2021, 12 weeks of leave paid at 67 percent of the employee's average weekly wage or 67 percent of the state average weekly wage, whichever is less.

Employees must take NYPFL leave in no less than one-day increments. As with other statutorily provided leaves, the leave may be taken on an intermittent basis.

Employers subject to a collective bargaining agreement do not need to provide NYPFL leave, provided the agreement includes

paid leave equal to or greater than the leave that the New York law provides.

While the leave time and wage provisions may be getting most of the attention at the moment, savvy employers will also take note of the new right to reinstatement. Employees who take NYPFL leave must be offered the opportunity to return to their same or a substantially comparable position, with the same or substantially the same pay, benefits and job duties.

Employers must also continue to provide health insurance benefits to employees for the entirety of the NYPFL-qualifying leave, although they may require that employees continue to pay their portion of insurance premiums.

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Eligible employees will be entitled to eight weeks of paid family leave within a 52-week period under New York's Paid Family Leave Law.

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## WHO IS ELIGIBLE?

All full-time and part-time employees are eligible for NYPFL benefits.

Full-time employees, defined as those who work 20 hours or more per week, must have worked at least 26 weeks preceding the first day of leave taken under NYPFL to be eligible for the benefit. Part-time employees, or those who work fewer than 20 hours per week, must have worked at least 175 days preceding the first day of leave. These requirements must be achieved with the same employer.

An employee's immigration status does not affect eligibility for benefits.

Employees who are not covered under the NYPFL include those who are already receiving total disability benefits, are on administrative leave, are receiving unemployment insurance benefits, or are specifically included under New York's disability benefits law.

Many employers ask whether the NYPFL applies to out-of-state employers or employees. It applies only to employees working in New York state.



Therefore, if an employer retains employees inside and outside New York state, it is legally obligated to provide the benefits only to employees working in the state. This does not prevent employers from creating a uniform policy that applies to their entire workforce, but employers may need to cover the cost of benefits to out-of-state employees in such a case. In addition, out-of-state employers must provide the benefits to their in-state employees.

Put simply, the work location of the employee is what matters, not the location of the employer.

### WHO PAYS FOR THE MONETARY BENEFITS?

The answer to this question is part of the good news for employers.

Employees — not their employers — cover the cost of the monetary benefits under the law. This funding mechanism is akin to the funding method used for Social Security and unemployment benefits. Employees fund the benefit through mandatory deductions from their paychecks.

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Employees who take leave must be offered the opportunity to return to the same or a substantially comparable position.

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In most instances, employers simply need to contact their disability insurance benefits provider to arrange for paid family leave benefits insurance. Self-funded employers can opt to set up a self-funded fund for NYPFL benefits. They may also purchase coverage from a private insurer or the New York State Insurance Fund.

At the outset, employers are required to take deductions of 0.126 percent of an employee's weekly wages per paycheck, up to the annualized New York state average weekly wage. This rate is subject to change on an annual basis.

There is an exception to the mandatory paycheck deduction rule.

Employees who at the outset of their employment are reasonably not expected to qualify for NYPFL benefits must be provided a waiver so that deductions are not taken from their wages. This exception could apply to, for example, seasonal employees who will likely not work for the employer long enough to become eligible for paid leave under the law. The state Labor Department recently issued a waiver form for such employees, which is available at <http://on.ny.gov/2BqPZE1>

While the law only requires employers to make payroll deductions, they may opt to shoulder all or part of the cost of the salary supplement. It is important to note that employers were permitted to begin taking these deductions as early as July 1.

In any event, they must start collecting these contributions no later than Jan. 1, 2018. Otherwise, they may be subject to penalties and risk having insufficient funds to provide the monetary benefit to employees who take qualifying leave in the early part of 2018.

### WHAT ARE THE PARAMETERS?

Eligible employees can take leave for:

- (1) Bonding with a newborn, newly adopted child or foster child. Note that there is no prenatal component under the NYPFL. As a result, employees must use disability leave, or other paid time off, for leave taken prior to the birth of a child. The NYPFL leave must be taken during the first year following the birth, adoption or placement of a child.
- (2) Caring for a family member with a serious health condition. "Family members" include a spouse, domestic partner, child, parent, parent-in-law, grandparent and grandchild. A "serious health condition" must involve inpatient care or continuing treatment or supervision by a health care provider; a common cold typically will not qualify.
- (3) A qualifying exigency related to the active military service of a spouse, child, domestic partner or parent of the employee.

Employees who wish to take leave for any of the above reasons must provide notice to their employers. If the need for leave is foreseeable (such as a planned medical treatment or birth, or a known military exigency), employees must give at least 30 days' notice. If the need for leave is unforeseeable, employees must give notice as soon as practicable.

Employers may require medical certification from a health care provider for the leave, but they should be mindful of certification requirements under other related leave laws. For instance, the New York City Earned Sick Time Act prohibits medical certification (a doctor's note) for leaves of absence of less than four consecutive work days.

Employees who want to take a qualifying leave under the NYPFL must submit the request form to the employer for completion and then to the employer's insurance carrier. They must also provide appropriate documentation for the leave. The forms for each of the above types of leave are available at <http://on.ny.gov/2ywKdQa>.

### HOW DOES PAID FAMILY LEAVE INTERACT WITH OTHER LEAVE BENEFITS?

The NYPFL affects other types of employer-provided or statutorily required leaves.

Typically employers will have at least three types of leave that may overlap with the benefits provided under the NYPFL:

paid time off, disability leave, and Family and Medical Leave Act leave.

Under the NYPFL, employers may allow, but may not require, employees to use paid time off during a qualifying leave. Additionally, employees in New York state are only entitled to a total of 26 weeks of disability leave and NYPFL-qualifying leave combined. They cannot stack their NYPFL leave on top of their 26-week disability leave allotment.

Finally, employees must use their NYPFL leave time concurrently with leave time taken under the FMLA when leave is taken for overlapping qualifying reasons. For example, employees taking leave to care for a spouse after serious surgery will use time from their NYPFL and FMLA leave banks.

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### The law applies only to employees working in New York state.

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However, employees taking leave for their own surgery will only use time from their FMLA leave banks, as an individual's own serious health condition is not a qualifying reason for leave under the NYPFL.

#### WHAT SHOULD EMPLOYERS DO NOW?

Although the NYPFL does not go into effect until Jan. 1, 2018, there are several things employers should do now.

To begin, if an employer has not done so already, it should speak with its disability insurance carrier to secure the leave insurance benefits before the law takes effect. As the leave is funded through payroll deductions, employers should also put their payroll provider on notice of the date on which it will need to begin deducting the contributions from the employees' paychecks (remember, employers can start taking deductions immediately but are required to do so beginning Jan. 1, 2018).

Employers should also ensure all of their leave policies are updated to take into account the effect of the NYPFL upon other types of leave. For example, some employers may need to amend their FMLA policies to require that employees take FMLA leave concurrently with NYPFL-qualifying leave.

Employers must also evaluate which of their job classifications are reasonably anticipated to qualify for NYPFL leave and which job classifications, if any, may not qualify. As noted above, seasonal employees may be among the types of employees who will not qualify for NYPFL leave and, therefore, should be given the state Labor Department's waiver form at the start of employment so that deductions are not taken from their paychecks.

Finally, employers must take steps to comply with the NYPFL notice and recordkeeping requirements.

Employers should download the forthcoming Labor Department poster notifying employees of their rights under the NYPFL. Also, they are required to set forth in writing their NYPFL policy and employees' rights thereunder. This can be accomplished through a simple addendum to the employee handbook or may be issued as a stand-alone policy.

These are just some of the ways employers may prepare themselves for the new requirements under the NYPFL. As always, the best way to ensure legal compliance is to seek the advice of experienced employment counsel.

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