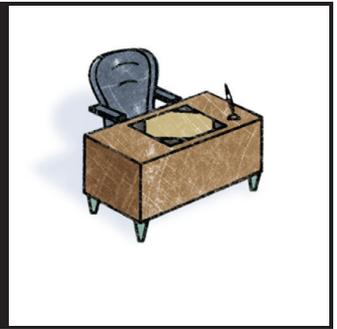




# PHILLIPS LYTLE LLP CLIENT ALERT

## LABOR & EMPLOYMENT



DECEMBER 2017

## *New York Paid Family Leave Update*

The New York Paid Family Leave Benefits Law (“Law”) will take effect on January 1, 2018, requiring virtually all private employers in New York to provide paid family leave (“PFL”) benefits to eligible employees. Employers continue to have many questions about the administration and application of the Law as they work towards implementing its requirements. This alert provides an overview of the Law and the most recent PFL developments so that New York employers will be ready to comply with the Law when it takes effect.

### **Covered Employers**

The Law applies to virtually all private employers with at least one employee. Public employers are exempted, but may opt into PFL benefit coverage.

### **Eligible Employees**

Full-time employees (those scheduled to work 20 or more hours per week) are eligible for PFL after working 26 consecutive weeks. Part-time employees (those working fewer than 20 hours per week) are eligible after working 175 days. Certain employees are excluded from coverage, such as clergy and individuals employed in a professional or teaching capacity for a religious, charitable or educational institution, but employers may voluntarily provide PFL to such employees by filing an application with the New York State Workers’ Compensation Board (“WCB”).

### **Funding**

PFL is fully funded by employees through premium contributions deducted from their paychecks. The premium contribution is set by the New York Superintendent of Financial Services and the initial rate for 2018 is 0.126 percent of an employee’s weekly wage, not to exceed 0.126 percent of New York’s current average weekly wage of \$1,305.92. Based on these figures, the initial maximum employee contributions will be \$1.65 per week. Employers may subsidize all or part of their employees’ premium costs.

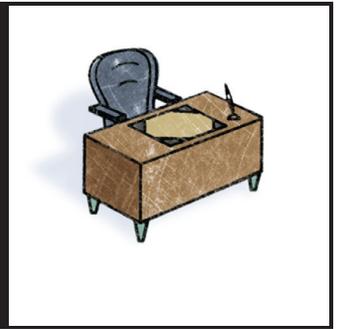
### **Reasons for Leave**

PFL may be taken (1) to bond with a child after birth, adoption or foster placement, or to attend to adoption or foster placement requirements; (2) to care for a family member with a serious health condition; or (3) because of a qualifying exigency arising out of an employee’s spouse, domestic partner, child or parent being on active duty in the armed forces of the United States or being notified of an impending call or order to active duty. A “child” includes a biological, adopted or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or the person to whom the employee stands *in loco parentis*. A “family member” means a child, spouse, domestic partner, parent (biological, foster or adoptive), parent-in-law, stepparent, grandparent, grandchild, legal guardian or other person who stood *in loco parentis* to the employee when the employee was a child, who has a serious medical condition.



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### Amount and Use of Leave

Eligible employees are entitled to up to eight weeks of PFL in 2018, 10 weeks in 2019 and 2020, and 12 weeks in 2021 and thereafter in any 52-consecutive-week period. The 52-week period is measured retroactively with respect to each day for which PFL benefits are claimed. PFL must be taken in full-day increments. An employee who is eligible for both PFL and short-term disability benefits may not receive more than 26 weeks of disability and PFL benefits in any 52-consecutive-week period. PFL may be taken all at once or intermittently. Employees who are related may be prohibited from using PFL at the same time to bond with the same child or to care for the same family member.

### Leave Requests

It is the employee's responsibility to request and apply for PFL benefits. The employee must inform his or her employer when he or she needs to be absent for a PFL qualifying reason. When leave is foreseeable, the employee must give at least 30 days' advance notice of leave. When leave is not foreseeable, the employee must give notice as soon as practicable, which in most circumstances will be the same day or next business day. An employee taking intermittent PFL must provide notice as soon as practicable before each day of intermittent leave.

To initiate a claim for PFL benefits, the employee must obtain a Request for Paid Family Leave form, complete the employee section and submit it to the employer. (The form may be obtained [here](#).) The employer then must complete its portion of the form and return it to the employee who must then submit it to the employer's PFL insurance carrier with all required

certifications. The insurance carrier is responsible for reviewing and approving or denying claims for PFL.

### Use of Paid Time Off

An employer may not require employees to use accrued paid leave during PFL, but may allow employees to use all or part of their accrued paid time off to receive full pay while on PFL.

### Interaction with FMLA Leave

All PFL that also qualifies for leave under the Family and Medical Leave Act ("FMLA") may be designated as running concurrently with FMLA leave by notifying the employee at the start of the leave. Failure to notify the employee will result in the employee being able to use both PFL and FMLA leave separately. Where proper notice is provided, the employee may be required to use accrued paid time off in accordance with the employer's FMLA policy when leave qualifies as both PFL and FMLA leave. (This is an exception to the prohibition against forcing employees to use unused accrued paid time off for PFL.)

If an employee refuses to apply for PFL for any leave that also qualifies as FMLA leave, the leave may nonetheless be counted against the employee's PFL entitlement, so long as the employer informs the employee of his or her eligibility for PFL and designates the leave as FMLA leave. If an employee uses intermittent FMLA leave for portions of any workday and such leave is for a covered PFL reason, the leave hours may be tracked and subtracted from the employee's PFL benefit amount when such hours reach the number of hours in the employee's usual workday.



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Employers covered by the FMLA who do not already use the rolling 12-month period measured backward for determining FMLA leave eligibility may wish to consider switching to that measurement period. This would allow for them to align their FMLA and PFL measurement periods to reduce the likelihood of employees being able to stack PFL and FMLA leave and for ease of administration. (A change in the FMLA measurement period requires 60 days' notice to employees before taking effect.)

### Waiver of PFL Benefits

Full-time employees who will not work 26 consecutive weeks and part-time employees who will not work 175 days in a 52-consecutive-week period may opt out of PFL coverage. Employers must provide such employees with the option to opt out by completing a written waiver approved by the WCB, which must be kept as long as the employee is employed. (A copy of the waiver form may be obtained [here](#).)

However, within eight weeks of any regular schedule change of an employee that requires them to continue working for 26 consecutive weeks or 175 days in a 52-consecutive-week period, the employee's waiver will be deemed revoked and the employee will be obligated to begin making PFL contributions, including any retroactive amount due from his or her date of hire or January 1, 2018, whichever is most recent. An employee eligible for a waiver who does not file one is required to make PFL premium contributions for the full duration of his or her employment, and the employer is obligated to provide PFL benefits to the employee when he or she becomes eligible for PFL.

### Continuation of Benefits While on PFL

The health insurance of an employee who takes PFL will be continued on the same terms as when the employee was working. An employee's health insurance coverage while on PFL can be terminated if the employee's portion of the health insurance premium is more than 30 days late.

### Notice and Posting Requirements

Employers must obtain from their PFL insurance carrier or licensed agent, and post and maintain in a conspicuous place accessible to employees, a PFL Notice of Compliance similar to the notice required to be posted for workers' compensation and disability insurance. (A sample is available [here](#).)

If an employer maintains any written guidance for employees about employee benefits or leave rights, such as an employee handbook or policy guide, information about an employee's PFL rights and obligations must be included in the handbook or guide. If an employer does not have any such written guidance, they must provide their employees with a separate written notice containing such information. The WCB recently issued a guide titled *Model Language for Employee Materials* that contains language it suggests should be included in any written materials about PFL provided to employees. (A copy is available [here](#).)

Whenever an employee requests PFL or takes time off for a PFL qualifying event, but has not requested PFL, a covered employer must provide the employee with a Statement of Rights issued by the WCB. The Statement of Rights must be provided within five



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business days after the employee's seventh consecutive day of absence due to a PFL qualifying event or within five business days after the employer has received notice that the employee's absence is due to a PFL qualifying event, whichever is later. The WCB's website also says that the Statement of Rights can be provided to employees to educate them about their PFL rights. (A copy of the Statement of Rights is available [here](#).)

### What to Do Before January 1, 2018

To ensure that they are ready to comply with the Law when it takes effect on January 1, 2018, employers should:

- Obtain PFL insurance coverage or arrange for self-insurance;
- Post and maintain the Notice of Compliance in a conspicuous place;

- Inform employees about PFL and update employee handbooks to include PFL information or provide written guidance about PFL to employees;
- Update payroll processes or work with their payroll manager to collect the employee PFL premium contribution;
- Identify employees eligible for a waiver and let them know they can choose to waive PFL coverage; and
- Consult with their labor and employment counsel for guidance in preparing and amending their leave policies to ensure compliance with their leave obligations under the Law, FMLA and other leave laws.

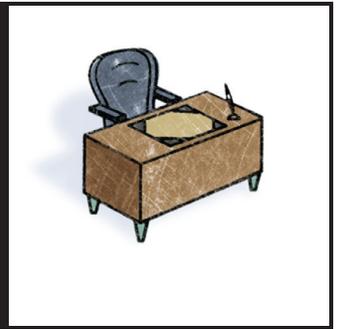
### Additional Assistance

*Should you have any questions regarding the PFL update, please contact any of the attorneys on our Labor & Employment Practice Team. ■*



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