

In-House Counsel's Guide to the New York Paid Family Leave Benefits Law

By A. Jonathan Trafimow and Kelly Schneid

The New York Paid Family Leave Benefits Law ("PFL") will take effect on January 1, 2018.¹ In-house counsel can, and should, prepare now.

What In-House Counsel Needs to Know

PFL is not simply the state mirror-image of the federal Family and Medical Leave Act (FMLA). PFL is much broader, as discussed below.

The Basic Overview

Unlike FMLA, PFL requires *almost all* private employers in New York State, *regardless of size*, to provide eligible *employees* (as distinct from independent contractors) with *paid* leave to engage in "family care." Family care is not limited, as one might think, to caring for a newborn child. Rather, "family care" under PFL permits an employee to take paid time off work for one of three reasons: (1) to bond with a child during the first 12 months *following* birth, adoption, or foster care placement; (2) to provide physical or psychological assistance to a family member (specifically, a child, spouse, domestic partner, parent, grandchild, grandparent, or parent-in-law) with a "serious health condition" (defined as "an illness, injury, impairment or physical or mental condition that involves: inpatient care in a hospital, hospice or residential health care facility; or continuing treatment or continuing supervision by a health care provider"); or (3) to engage in certain activities in light of a "qualifying exigency" when a family member is on, or called to, active military duty.

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Who Qualifies for PFL Leave?

Employees who work full-time (e.g., for at least 26 consecutive weeks) or part-time (e.g. for at least 175 days), with few exceptions, can take PFL leave. These exceptions largely prohibit certain employees from taking PFL leave (e.g., executive officers and teachers at religious, charitable, and educational institutions; government employees) and prohibit employees from double-collecting (e.g., employees cannot take PFL leave if they receive full-time disability pay pursuant to a worker's compensation claim, are on administrative leave, or are collecting sick pay or paid time off).



A. Jonathan Trafimow



Kelly Schneid

How Much PFL Leave Can Qualified Employees Take?

New York State will gradually implement PFL. As of January 1, 2018, qualified employees can take eight weeks of leave while being paid 50 percent of their average weekly wage (AWW) (capped at \$652.96 or 50 percent of \$1,305.92, the State's current AWW). As of January 1, 2019, qualified employees can take 10 weeks of leave while being paid 55 percent of their AWW (capped at 55 percent of the State's then-AWW). As of January 1, 2020, qualified employees can take 10 weeks of leave while being paid 60 percent of their AWW (capped at 60 percent of the State's then-AWW). Starting on January 1, 2021 (and continuing thereafter), qualified employees can take 12 weeks of leave while being paid 67 percent of their AWW (capped at 67 percent of the State's then-AWW). If the qualified employee's AWW is less than \$100, the employee will receive his/her full wages while on PFL leave. Notwithstanding the above, PFL leave must be taken concurrently and cannot be stacked with FMLA leave.

What In-House Counsel Needs to Do

In-house counsel should educate relevant departments at their place of employment about proper protocol regarding payroll deductions, requests to take leave, insurance coverage, employment contracts and notices, reinstatement, and denied requests for leave.

- Advise Payroll Department to Oversee Weekly Wage Deductions

In-house counsel should educate accounting/payroll departments to ensure they are taking proper deductions from employee paychecks now. PFL is supposed to be entirely employee funded and explicitly states that "no employer shall be required to fund any portion of the

A. Jonathan Trafimow is a partner at Moritt Hock & Hamroff LLP and chairs the firm's employment practice. Kelly Schneid is an employment and litigation associate at Moritt Hock & Hamroff LLP. Mr. Trafimow and Ms. Schneid advise employers on best practices to comply with employment laws and regulations. They represent employers in litigation involving disparate claims ranging from discrimination and retaliation to wrongful termination and wage/hour violations. Mr. Trafimow can be reached at jtrafimow@moritthock.com and Ms. Schneid can be reached at kschneid@moritthock.com.

family leave benefit." To that end, employers can currently deduct 0.126 percent (a percent that will be adjusted annually) from qualified employees' weekly wage, but in no event more than \$1.65 per week. Employers should diligently oversee payroll because they cannot make a deduction "later than one month after payment of wages" and, even then, "failure to withhold may not be recovered by withholding larger than the maximum employee contribution at a later date." Employers can, and should, start collecting employee contributions now so that they can cover insurance policy premiums and have sufficient funds to pay employees who take leave as early as January 1, 2018.

- Educate Human Resources on the Paperwork Employees Must Complete to Seek PFL Leave

In-house counsel should educate human resource departments on the proper documentation employees must submit to take PFL leave.

Whereas PFL requires employees to submit "written notice" and "proof of need for family leave" to the employer, the rules and regulations purporting to clarify PFL (PFL R&R), require employees to submit a "Request for Paid Family Leave" (presumably the "written notice") and "any necessary certifications or proof of claim documentation" (presumably the "proof of need") to the insurance carrier.

The "written notice" is sufficient if it is on Form PFL-1 (or a comparable form designated by the relevant insurance carrier or self-insured employer). The employee should submit Form PFL-1 to his/her employer, who should then complete the "employer information" section and return it to the employee within three (3) business days. The "proof of need" or "proof of claim" will depend upon the grounds invoked for the leave; however, the proof will be sufficient if it is on Forms PFL-2, 3, 4, and 5 (or a format that complies with 12 NYCRR 380-4-4.3).

- Confirm Insurance Coverage for Employees on PFL Leave

While an employee is on PFL leave, the employer must maintain that employee's (and, where applicable, that employee's family's) existing health benefits unless the employee fails to pay the required premiums.

- Confirm Proper Notices and Employment Documents

In-house counsel should ensure that their employers post and circulate proper notices regarding PFL and include (or omit) certain information from their handbooks and contracts.

PFL requires covered employers to provide sufficient notice of the law. Employers must not only post informative notices in a "conspicuous" location(s) throughout their place(s) of business, they must also send a written statement (in an approved form) advising an employee of his/her rights "within five business days after the employee's seventh consecutive day of absence due to [] family leave or within five business days after the employer has received notice that the employee's absence is due to [] family leave, whichever is later." PFL R&R further requires employers to provide written guidance to employees "concerning all of the employee's rights and obligations under PFL, including information on how to file a claim for paid family leave." This written guidance can be in a standalone document or included within other written policies, guidelines, or handbooks provided to employees.

Whereas PFL prohibits employers from requiring or asking employees to waive benefits thereunder, in-house counsel should confirm that employment agreements in place are compliant in this respect.

"Employers violating PFL are subject to monetary fines and/or imprisonment. Employers that fail to provide PFL leave for the first time will be guilty of a misdemeanor and, upon conviction, slapped with a fine (\$100 to \$500) or imprisoned for up to one year."

- Educate Department Heads About Reinstatement

Although employees do not accrue seniority, vacation, sick or personal days, or employment benefits while they are on PFL leave, they must be reinstated to the same job, or a comparable job, upon returning to work.

- Provide Guidance to Employees Denied PFL Leave

PFL provides specific procedures for an employee to appeal the denial of benefits. Within 26 weeks of receiving a written denial from an insurance carrier, an employee can submit to the Chair of the Worker's Compensation Board notice that PFL leave was not paid, proof of entitle-

ment to paid leave, proof of employment, proof of wages and other relevant facts. The Chair can then conduct a hearing on the employee's claim and issue a decision, which will be final as to all questions of fact and law. The Chair may refer the dispute to arbitration, as PFL R&R specifically states that any "claim-related dispute... arising under the PFL is subject to arbitration." PFL R&R identifies specific procedures for requesting and pursuing arbitration. Once an arbitration award is issued, a party can seek to modify the award by submitting a written application to the arbitrator, confirm the award, or vacate/modify the award by filing an application with the court based on permissible grounds.

- Encourage Employer to Identify Short-Term Assistance and/or Engage in Cross-Training

Like FMLA, PFL permits qualified employees to take leave intermittently during the 52 week period following the qualifying event (e.g., birth, adoption, foster placement, illness, or military exigency). PFL requires employees to give employers at least 30 days' notice before taking foreseeable leave, and to give notice "as soon as possible" before taking unforeseeable leave. Accordingly, in-house counsel should encourage employers to have a process in place for soliciting short-term hires and/

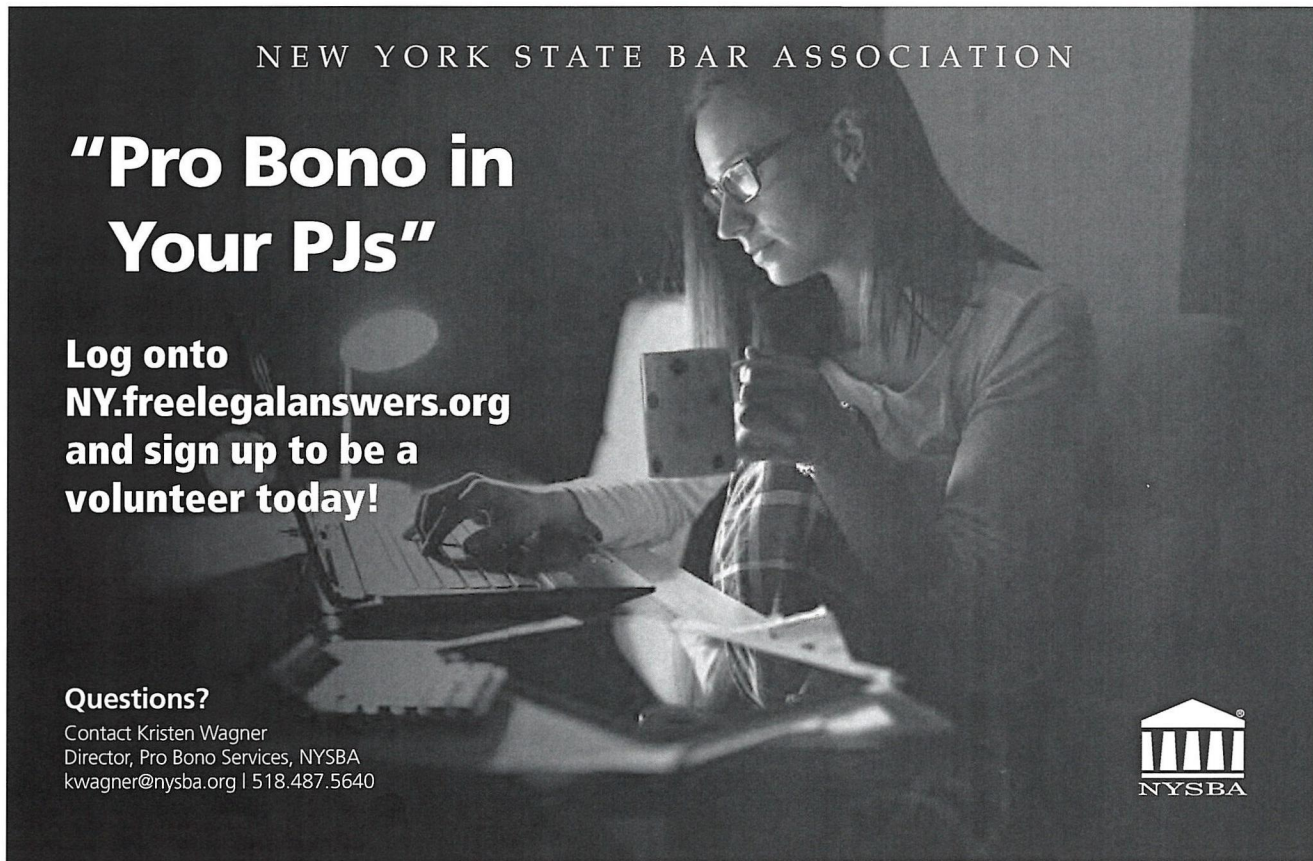
or cross-training employees to account for PFL-related absences.

Penalties for PFL Violations

Employers violating PFL are subject to monetary fines and/or imprisonment. Employers that fail to provide PFL leave for the first time will be guilty of a misdemeanor and, upon conviction, slapped with a fine (\$100 to \$500) or imprisoned for up to one year. The fine and period of imprisonment increase for subsequent violations. Where the offending employer is a corporation, the president, secretary, treasurer, or comparable officer will be subject to the same penalties. The Worker's Compensation Board will also impose a penalty on the employer of not more than ½ of 1 percent of the employer's weekly payroll for the period of the violation plus a sum of not more than \$500.

Endnote

1. This article was prepared for publication on or around July 10, 2017 and therefore does not take into account any revised rules and regulations issued by the Worker's Compensation Board thereafter.



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Director, Pro Bono Services, NYSBA
kwagner@nysba.org | 518.487.5640

