



Rose & Kiernan, Inc.

Sept 15th Webinar – Update on NY Paid Family Leave

Follow-up Q&A

The answers provided within are an extension of our April 2017 Paid Family Leave Webinar & FAQ and some pertinent content has been repeated.

Q1. Does PFL apply to only those that work in NY, or also those who live in NY but work in another state, say CT or VT?

A. Employees are considered eligible for PFL when; they physically work in NYS, or, do not have a worksite in any specific state (remote employee/telecommuter) but reside and work from home in NYS.

Q2. Can we offer this coverage to non-NYS employees?

A. There are restrictions on extending PFL to non-NY employees. Groups are advised to contact their carrier to determine if/how they will extend coverage.

Q3. Is the employee paying the entire premium?

A. Yes, NY PFL is intended to be 100% funded through employee payroll deductions. The maximum employee contribution is set by the Department of Financial Services and updated each year by September 1. For 2018, the rate is 0.126% of an employee's weekly wage capped at 0.126% of the *annualized* New York State Average Weekly Wage.

Q4. Do deductions start after the 26 weeks or immediately upon hire?

A. Deductions will start with an employee's first payroll and for all current employees on 1/1, even if they haven't met eligibility but are expected to.

Q5. We began employee payroll deductions 7/1 as directed by our payroll vendor. Is this OK?

A. Deductions were permitted to begin on 7/1, but employers need to be mindful of the regulations which state that Employers may not take more than the allowed amount. If you began deductions early you may need to stop deductions mid-year when the limit is met, or, refund employees. Since these funds consist of employee contributions, you probably should keep them segregated from general funds.

Q6. Is a refund given if an employee leaves before 26 weeks?

A. No. There is no requirement to refund any deductions when employees leave an organization.



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Q7. Can an employee opt-out of PFL payroll deductions?

A. No – participation is not optional. There will be a waiver made available but ONLY for “an employee of a covered employer whose regular work schedule is less than 26 weeks or 175 days in a 52-consecutive week period.” In other words, for those employees who would never be eligible to utilize the benefit.

Q8. Are the employee contributions required regardless of the status of the employee (i.e. f-t, p-t, or per diem)?

A. Only the employees who fall into the category above (Q7) and file the waiver will be exempt from the obligation to make contributions to the cost of PFL, and exempt the employer from the obligation to provide PFL benefits.

Q9. We have a per-diem population who do not have scheduled hours - are they still eligible for PFL?

A. Yes, as long as they meet the eligibility requirements. Those employees with unknown schedules who file a PFL waiver should be monitored to determine if they are getting close to eligibility and revocation of the waiver.

Q10. What if we hire an employee and they waive PFL, and then they increase their hours to meet eligibility?

A. Within eight weeks of any change in the regular work schedule of an employee that would make them eligible for PFL benefits, any waiver filed will be deemed revoked. An employee whose waiver has been revoked shall be obligated to begin making contributions to the cost of family leave benefits, including any retroactive amounts due from date of hire, as soon as the employee is notified by the covered employer of such obligation

Q11. Which employees are considered part-time?

A. Employees who work less than 20 hours are considered part-time under PFL and will become eligible after working 175 days in a 52 week period. Note -there is no minimum hours requirement on each day worked.

Q12. Are high school students exempt from the program and from payroll deductions?

A. As PFL is provided as a rider to NY State DBL, it will apply directly to those policies; anyone exempt from DBL, such as high school students, will also be exempt from PFL.



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Q13. What time is counted towards eligibility? Only hours worked?

A. Scheduled vacation, personal, sick time, and all other approved periods where the employee is away from work but is still considered to be an employee will count towards eligibility. If an employer's normal business activity shuts down at the same time each year, such as road construction ending in winter, that is considered the employer's normal course of business. If the employer intends to rehire the employee to the same position as when the shutdown occurs, the employee, when rehired, will start in the same status as when they were laid off. For example, if the employee had met the 26 weeks of eligibility when laid off, they return to work eligible from day one. If they met 15 weeks when laid off, they return with 15 weeks toward the 26 week eligibility requirement.

Q14. Would a 4th quarter new hire be eligible to waive for just the first year as he/or she won't meet the criteria?

A. No, the eligibility period of 26 weeks or 175 days is measured from the hire date, not Jan 1.

Q15. Is there a penalty for overcharging your employees?

A. The regulations note that "A covered employer shall use his or her employees' contributions to provide PFL benefits to employees and shall promptly return to employees any surplus in employee contributions that exceed the annual premium." Employer use of employee contributions to provide PFL has been marked as a subject for audit by the WC Board.

Q16. Would employees be eligible to take both PFL and FMLA at the same time?

A. If the PFL leave also qualifies under the FMLA as a covered leave, the 2 programs should run concurrently. The employer must still notify the employee that it is an FMLA leave and designate the leave as FMLA.

Q17. May an employee use both Disability and PFL? If so, when would the PFL come into play?

A. State disability and PFL are mutually exclusive and therefore will not run concurrently; however, there may be scenarios (such as maternity leave) where one event allows leave under both programs. For example, with maternity leave, an employee could collect disability payments pre-birth for incapacity related to pregnancy and/or the first 6-8 weeks of leave once the baby is born; this would not be a PFL-covered absence. The employee could then transition to PFL under "bonding leave" for an additional 8 weeks (in 2018) of paid, job-protected leave.



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Q18. Can an employee use paid time to make up the 50% of wages that PFL doesn't cover?

A. An employee may choose, but cannot be required, to use accrued and available vacation or other paid time off to receive a full salary while on PFL. An employer should adopt one of the following options as part of their PFL policy:

- 1) Supplement pay with employee accruals to make up the remaining 50%
- 2) Substitute pay with 100% accruals, and file a claim for reimbursement from the insurance carrier (similar to State DBL or WC process)

Q19. If a baby is born in Feb and PFL starts in Jan - how many weeks can EE take in 2018?

A. For a baby born February 2018, the employee will have 8 weeks to use at any time during the following 52 weeks.

For a baby born in February 2017, the employee will have the number of weeks left in their 52 week allotment; for example DOB 2/1/17 will have approximately 4 weeks to use in 2018, while DOB 2/15/17 will have approximately 6 weeks.

Q20. Can an employee request 4 weeks of consecutive leave and then reserve 4 weeks for intermittent leave to use for instances such as doctor appointments, child care...etc?

A. An employee may potentially need to care for multiple qualified family members or events where leave can be divided, but may not exceed the maximum combined benefit (8 weeks in 2018) in a 52 week period. Intermittent leave is allowable for to care for a family member with a serious health condition and for bonding, which may encompass child care, but would not be approved for one-off doctor's appointments or sick days.

Q21. How would PFL be handled with a married couple - 8 weeks each?

A. Yes – however, if both spouses work for the same employer, the employer may ask the carrier to deny paid family leave to more than one employee at the same time to care for the same family member or to bond with a child.

Q22. Under PFL, Is there a definition for serious health condition?

A. The definition for “serious health condition” takes up nearly 1.5 pages of the proposed regulations; below is an abbreviated summary, but please feel free to reach out to RK for the full definition:

An illness, injury, impairment or physical or mental condition that involves:



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- Inpatient care in a hospital, hospice or residential health care facility, or,
- Continuing treatment*/supervision by a health care provider that creates 3+ continuous days unable to work, attend school or perform regular daily activities
- Any period in which a family member is unable to work, attend school or perform regular daily activities due to a chronic serious health condition*
- A long term or permanent period in which a family member is unable to work, attend school, perform regular daily activities or is otherwise incapacitated due to a condition in which lack of treatment causes further incapacitation, or
- Conditions for which treatment may not be effective. The family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

**Chronic serious health condition and treatment each have specific parameters as well*

Q23. As a Public Employer I have DBL which I pay for, but I am not going to opt in to PFL. Is there anything to be concerned with immediately?

A. An employer who provides voluntary disability benefits to its employees must notify its employees and the WC Board that it will or will not be providing family leave benefits to employees prior to December 1, 2017.

The WC Board has confirmed that their notice can be a simple email to the *Plans Acceptance Unit* at pau@wcb.ny.gov. Public entities continuing DBL but not PFL should also notify their carriers to ensure the coverage is not added.

Q24. Does an employer have to use the same carrier that has our Statutory DBL policy or can it be 2 separate carriers?

A. Coverage needs to come from the same carrier since PFL will be a rider to the DBL policy.

Q25. Is it up to the employer to contact their DBL carrier to add PFL coverage?

A. No. All Carriers who offer DBL are required by the State of NY to add PFL coverage for each customer effective 1/1/18. PFL coverage will be added as a rider to the existing DBL policy and occur automatically.

Q26. Does PFL include union employees?

A. Yes, when they are employees of a covered employer. A collective bargaining agreement (CBA) may not permit an eligible employee to waive their rights to PFL or otherwise opt-out of the program. If a CBA provides family leave benefits that are at least as favorable as those



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under PFL, the employer will be exempt from providing benefits/taking deductions. Where unionized employees are not employed by a covered employer, the benefit may be negotiated.

Q27. Since the benefit is paid by the carrier, how do we take premium for medical, 401k, etc.?

A. If an employer is paying employees with any type of accruals, they should be deducting premium from payroll. Otherwise, Employers should devise a plan for employees to remit health insurance premiums while out on leave. Certain benefits such as retirement contributions could be reactivated and even caught-up through extra deductions upon return.

Q28. What is to stop a carrier from charging more for DBL to cover PFL losses if the state set payroll deduction is insufficient to cover their costs?

A. Rates in New York are filed by product line and what losses the carriers report to the state are clearly defined as DBL and PFL. Therefore losses under one line cannot be transferred to another line.

Q29. Are PFL payments treated the same as 3rd party sick pay? We currently add disability payments to employee's w2; will we be adding PFL payments too?

A. PFL payments do not meet the IRS definition of sick pay since it is payment for care of another person, and not the employee's own illness, injury or disability. NYS Notice N-17-12 released in August clarifies that benefits paid to employees under the NYS PFL are considered non-wage income and not considered as money paid by the employer.

Q30. When the 1099 is issued by the carrier, does the employer match the FICA like they do with 3rd Party Sick Pay?

A. Using the reasoning above, supported by NYS Notice N-17-12 and IRS Notice 2015-6 for the definition of sick pay, PFL payments will not be subject to FUTA or FICA. Payment is subject to Federal income tax which is accounted for by the insurer providing the 1099

While these answers are based off of Paid Family Leave final regulations from multiple sources, there are still outstanding items and any interpretation provided is still subject to revision. This information is intended to assist employers with compliance in the administration of their benefits plans and is not intended to be legal advice. All data used or reviewed is the sole responsibility of the employer.