



**A GUIDE TO  
PAID FAMILY LEAVE POLICIES  
FOR NEW YORK STATE  
EMPLOYERS**

**SEX AND LAW COMMITTEE**

**DECEMBER 2017**



Effective January 1, 2018, all eligible employees are entitled to Paid Family Leave (“PFL”) pursuant to the New York State Paid Family Leave Benefits Law (“NYSPFL”). PFL will improve families’ ability to care for themselves and their families without compromising their economic security by increasing both the number of weeks of leave employees are entitled to take and the amount of benefits they will receive while on leave.

The Sex and Law Committee of the New York City Bar Association has a strong interest in seeing the NYSPFL properly implemented by employers throughout New York State and is thus publishing this guide to provide a model minimum policy to employers in order to help simplify the implementation process. Because data on outcomes after implementation of paid family leave policy law in other states demonstrate that there is room for employers to improve upon NYSPFL, the Sex and Law Committee also offers a “better practices” model policy that incorporates levels of leave and benefits that have shown positive outcomes for both employers and employees.

The Committee hopes that employers give these model policies due consideration in their efforts to ensure that they are following best practices when updating and implementing leave policies that conform with the NYSPFL.

***Please note that this Guide provides general information only. The information in this guide should not be used or taken as legal advice for a specific situation. For legal advice about your rights or obligations in a particular situation, please consult with a lawyer.***

## **The Sex and Law Committee of the New York Bar Association**

Mirah Curzer and Melissa Lee, Co-Chairs

### **Paid Family Leave Subcommittee**

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### **About the Committee:**

The Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace and civic life and to promote respect for the rule of law. The Committee's members work and practice in a wide range of areas, including, violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. Because the New York paid family leave program has a significant impact on the lives and status of women in New York, the Sex and Law Committee has set out to provide model policies for employers that both conform with the requirements of the regulation and represent "better" practices surrounding paid family leave policies.

December 2017

## I. INTRODUCTION

Paid family and medical leave programs have already been implemented in California, New Jersey, and Rhode Island, with programs in the works under laws passed in Washington, D.C. and Washington State.<sup>1</sup> The experiences of these states have shown that paid family and medical leave laws can provide critically needed benefits at an affordable cost and without burdening businesses. In California, 92.8% of employers reported that paid family leave had a positive or neutral effect on employee turnover,<sup>2</sup> saving employers the costly step of replacing an existing employee.<sup>3</sup> A majority of California employers also reported positive or neutral effects on productivity (88.5%), profitability/performance (91.0%), and employee morale (98.6%).<sup>4</sup>

With the implementation of NYSPFL, small businesses can now afford to offer leave benefits that can give them a competitive advantage in hiring,<sup>5</sup> because paid leave through a social insurance program levels the playing field for small businesses who compete with much larger companies. This is evident from reports about Rhode Island's paid family leave law: one year after the law went into effect, a majority of small employers were in favor of the program.<sup>6</sup>

NYSPFL brings these benefits to New York State but the new law is closer to a good starting point than the ideal. For this reason, the Committee provides two model policies for employers. The first represents the baseline minimum model policy, thus facilitating compliance for employers who can seamlessly incorporate the new policy into their existing human resources guidance. The second sets out a model policy that lays out the "better" and "best" practices.

For example, while NYSPFL provides for eight weeks of family leave in 2018 (and not 12 weeks until 2021), the "better" practices policy provides for 12 weeks as of January 1, 2018. This is consistent with the Family and Medical Leave Act ("FMLA") and also ensures that workers have the time they need to attend to their own or a family member's serious health needs, address the impact of a family member's military deployment, or bond with a new child. Research shows that taking at least 12 weeks of leave has important health benefits for both children and parents.<sup>7</sup> Leading health groups, including the American Academy of Pediatrics, recommend that even healthy, full-term infants should not be placed in day care until they are at least twelve weeks old due to health risks.<sup>8</sup> Recognizing that 12 weeks leave provides important health benefits, the NYSPFL provides for 12 weeks of paid leave starting in 2021 (and as an interim step 10 weeks in 2019 and 2020). While 12 weeks paid leave is not required until 2021, the Committee urges employers to adopt a policy providing for 12 weeks of leave now.

And, while the amount of pay under NYSPFL increases over time from 50% in 2018 to 67% in 2021, the Committee urges employers to provide 100% pay while employees are on family leave. This will allow the employee to remain on payroll with no interruption in pay, benefiting employee morale and retention. The employer would be reimbursed in part by the insurance provider.

The Committee hopes that employers give these model policies due consideration in their efforts to ensure that they are following best practices when updating and implementing leave policies that confirm with the NYSPFL.

## **II. MODEL MINIMUM PAID FAMILY LEAVE POLICIES**

### **Eligibility**

Employees whose regular or average work schedule is 20 hours or more per week become eligible for PFL after 26 consecutive weeks of employment. Employees whose regular or average work schedules are less than 20 hours per week are eligible after 175 workdays (not calendar days). Accordingly, employees who were employed for at least 26 consecutive weeks or who worked 175 days (as applicable) prior to January 1, 2018 will be eligible for PFL on January 1, 2018.

### **Covered Purposes**

PFL may be only used for the following “Covered Purposes”:

- providing care for the employee’s child (including if adopted, step, or in loco parentis), domestic partner, parent, parent-in-law, grandparent, grandchild, or spouse with a serious health condition (including a serious mental health condition);
- bonding with the employee’s child within 12 months of the child’s birth or placement for adoption or foster care; or
- attending to certain needs (“qualifying exigencies”) arising from the employee’s child, parent, parent-in-law, spouse, or domestic partner’s active duty service in the armed forces.

### **Amount of Leave**

In 2018, eligible employees may receive up to eight (8) weeks of PFL during any rolling 52-week period. In future years, the number of weeks of leave employees will be able to receive will go up over time: in 2019 and 2020, employees may receive up to ten (10) weeks of PFL; starting in 2021, employees may receive up to twelve (12) weeks of PFL.

Leave can be taken intermittently in units as small as one day. For employees who regularly work less than five days per week, the maximum days may be prorated based upon their schedule.

### **Benefit Level**

In 2018, employees taking paid family leave will receive 50% of their average weekly wage, up to a maximum of \$652.96/week. In subsequent years, the percentage of their own wages employees receive will increase until 2021, when employees will receive 67% of their average weekly wage. The maximum weekly benefit will also increase over time in accordance with a formula set by state law.

Employees will generally receive this payment by applying to [INSURANCE CARRIER] (see “applying for paid family leave benefits” below). With permission from the Company,

employees may be able to substitute fully paid leave under some circumstances (see “substitution of full paid leave” below).

### **Employee Notice**

If the PFL is foreseeable, such as due to an expected birth or other qualifying event, employees must provide the Company at least 30 days notice before the leave is set to begin. If the leave is not foreseeable, such as when a medical procedure is scheduled with less than 30 days notice, then employees should give notice as soon as practicable. In addition, employees taking leave intermittently must provide the Company with notice as soon as is practicable before each day of intermittent leave.

### **Applying for Paid Family Leave Benefits**

Employees must apply for paid family leave benefits by submitting the appropriate form to [INSURANCE CARRIER], the paid family leave insurance carrier for the Company. Employees can acquire a copy of this form from [HR OR OTHER APPROPRIATE OFFICE/PERSON].

Employees should complete the employee portion of the form (Part A) and submit the employer portion of the form (Part B) to [HR OR OTHER APPROPRIATE OFFICE/PERSON]. The completed employer portion will be returned to the employee within three business days. Employees will also need to provide the insurance carrier with appropriate documentation of the need for leave, such as a birth certificate or documentation from a family member’s health provider, and complete the appropriate form regarding that documentation. Employees are responsible for submitting the completed application to [INSURANCE CARRIER].

Any claim-related dispute with the insurance carrier, including eligibility, benefit rate, and duration of paid leave, arising under the NYSPFL may be subject to arbitration in accordance with the NYSPFL.

### **Retaliation and Reinstatement**

Employees have the right not to be retaliated or discriminated against for exercising their rights under the NYSPFL, including the right to take PFL.

After taking PFL, employees have the right to be reinstated to the position they held prior to leave or to a comparable position with comparable employment benefits, pay, and other terms and conditions of employment. Taking PFL will not result in the loss of any employment benefit accrued prior to the date on which leave commenced; however, employees will not accrue seniority or employment benefits while on leave.

Employees whose rights are violated by their employer under the NYSPFL have the right to file a complaint with the Workers’ Compensation Board.

## **Health Insurance**

Employees will receive their existing health insurance benefits on the same terms for the duration of the PFL as if they had not taken such leave. During leave, employees must continue to make all required premium contributions; the Company will continue to pay for any portion of the premium the Company pays for while the employee is not on leave.

## **Payroll Deductions**

Pursuant to the NYSPFL, PFL will be funded by modest employee contributions deducted from employees' paychecks. For 2018, these deductions will equal 0.126% of employees' wages, up to a maximum of \$1.65 per week. These deductions will be used only to pay for paid family leave coverage as required by law. Payments for TDI of up to 60 cents per week are also deducted in accordance with state law.

## **Substitution of Fully Paid Leave**

Employees may, but are not required to, substitute accrued paid time off ("PTO") or any other applicable type of fully paid time off for some or all of the leave to which they are entitled under the NYSPFL, subject to the terms and conditions of such other paid time off policy. Employees who choose to do so will still receive all applicable rights and protections under the NYSPFL. If employees elect to take paid time off at 100% of salary in lieu of PFL benefits, the Company may request reimbursement from its insurance carrier for any PFL benefits that otherwise would be due to the employee.

## **Interaction with Disability Benefits**

Employees retain all applicable rights to disability benefits under both New York State law and the Company's policy. Employees cannot collect both PFL and disability benefits at the same time. However, an employee who is simultaneously eligible for both PFL and disability benefits may choose how and whether to take those benefits sequentially, subject to all applicable rights and restrictions. Combined, PFL and disability benefits must not amount to more than the 26-week benefit maximum during any 52 consecutive calendar weeks.

## **Interaction with Leave Under the Family and Medical Leave Act (FMLA)**

If an employee covered by the federal Family and Medical Leave Act ("FMLA") takes PFL for a purpose and under circumstances also covered by the FMLA, the Company may designate that period of leave as leave under the FMLA (i.e. may require that PFL and FMLA leave be taken concurrently). If the Company chooses to do so, the Company will notify the employee in writing, as required by law.

## **Compliance with All Applicable Laws**

Employees maintain all other applicable rights under city, state, and federal law, including but not limited to the FMLA, the Americans with Disabilities Act, the Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York City Human

Rights Law, and the New York City Earned Sick Time Act. The Company will comply with all applicable legal requirements.

Eligible employees will receive all paid family leave required by law, and this policy will be interpreted and applied, in accordance with NYSPFL, regulations thereunder, and all other applicable laws, and to the extent that this policy may conflict with those laws they are controlling over these policies. Further, the Company retains all rights and defenses under applicable law, whether or not specifically set forth in this policy.

### **Seasonal or Temporary Employee Waiver**

Employees whose schedules will never reach 26 weeks or 175 days (as applicable) in a 52-week consecutive period, such as seasonal or temporary employees, have the option, but are not required, to waive their PFL rights and not make contributions. Employees may do so by completing a written form, copies of which the Company will provide. If an employee chooses to waive his or her rights and circumstances change such that the employee will be employed or work for 26 weeks or 175 days (as applicable), this waiver will be automatically revoked within 8 weeks of the change in circumstances. The employee whose waiver is so revoked will begin making contributions for PFL through payroll deductions, including any retroactive amounts due from date of hire, upon notification from the Company.



### III. MODEL “BETTER” / “BEST” PRACTICES PAID FAMILY LEAVE POLICIES

*The Committee, recognizing that employers may desire to provide the most competitive leave and benefits policy, thus going beyond the “better” practices, have included in the below model a “best” practices option, in bracketed italics. To adopt the “best” practices model, simply replace the applicable sections of the policy with the bracketed, italicized text.*

While not required by law, the Company will provide all eligible employees with 12 weeks of 100% paid family & medical leave (“Paid Leave”) in any rolling 52-week period. While on Paid Leave, employees will receive full pay at 100% of their salary or average weekly wage. Leave can be taken intermittently in units as small as one day [*a half day*]. For employees who regularly work less than five days per week, the maximum days may be prorated based upon their schedule.

In certain circumstances, employees may be eligible for additional unpaid leave. For example, employees caring for a family member with a qualifying health condition connected to the family member’s current or past military service can take up to 26 weeks of leave in a 52-week period, but only the first 12 weeks are paid. Disabled or pregnant employees may also be entitled to additional unpaid leave. This policy is separate from the Company’s sick leave policy.

#### **Company Policy More Generous Than the Law**

Effective January 1, 2018, all eligible employees are entitled to 8 weeks of Paid Family Leave (“PFL”) pursuant to the New York Paid Family Leave Benefits Law (“NYSPFL”) at 50% of their pay up to a maximum of \$652.96 per week. Both the number of weeks of leave employees are entitled to take and the amount of benefits they will receive under the PFL while on leave will increase each year until 2021 when PFL will provide for 12 weeks of PFL at 67% of their pay up to a maximum set by the law.

The federal Family and Medical Leave Act, referred to as “FMLA”, provides for unpaid leave for up to 12 weeks in the course of a 12-month period for many of the same reasons as under the state law but also permits an eligible employee to take leave for his or her own serious health condition. [The FMLA does not apply to employers like us with fewer than 50 employees.]

Employees who are unable to work due to their own serious health condition may have the right to temporary disability insurance (“TDI”) payments under New York State Law. TDI payments are a maximum of only \$170 per week though.

The Company’s current policy (which the Company in its discretion may change at any time) is to provide all rights guaranteed under the PFL and FMLA to our employees – and to provide full pay for up to 12 weeks a year for that leave.

## **Eligibility**

Employees whose regular or average work schedule is 20 hours or more per week become eligible for Paid Leave after 26 consecutive weeks of employment. Employees whose regular or average work schedules are less than 20 hours per week are eligible after 175 workdays (not calendar days) [26 *consecutive weeks of employment*]. Accordingly, employees who were employed for at least 26 consecutive weeks or who worked 175 days (as applicable) prior to January 1, 2018 will be eligible for PFL on January 1, 2018.

## **Covered Purposes**

Paid Leave may be only used for the following “Covered Purposes”:

- due to the employee’s own serious health condition;
- providing care for the employee’s child (including if adopted, step, or in loco parentis), domestic partner, parent, parent-in-law, grandparent, grandchild, [sibling] or spouse with a serious health condition (including a serious mental health condition);
- bonding with the employee’s child within 12 months of the child’s birth or placement for adoption or foster care; or
- attending to certain needs (“qualifying exigencies”) arising from the employee’s child, parent, parent-in-law, spouse, or domestic partner’s active duty service in the armed forces.

## **Employee Notice**

If the need for Paid Leave is foreseeable, such as due to an expected birth or other qualifying event, employees must provide the Company at least 30 days notice before the leave is set to begin. If the leave is not foreseeable, such as when a medical procedure is scheduled with less than 30 days notice, then employees should give notice as soon as practicable. In addition, employees taking leave intermittently must provide the Company with notice as soon as is practicable before each day of intermittent leave. Notice must be provided to [HR OR OTHER APPROPRIATE OFFICE/PERSON].

## **Applying for Paid Leave**

The Company will continue paying employees through regular payroll while they are on Paid Leave, provided that if eligible the employee completes the necessary paperwork to apply for PFL and/or TDI. Employees seeking Paid Leave must contact [HR OR OTHER APPROPRIATE OFFICE/PERSON] 30 days prior to the leave if the leave is foreseeable, or as soon as practicable if the leave is not foreseeable. Because the Company provides Paid Leave in more circumstances than provided by law, not all employees requesting leave will be required to apply through the Company’s insurance carrier [INSURANCE CARRIER]. [HR OR OTHER

APPROPRIATE OFFICE/PERSON] will discuss which benefits, if any, the employee must apply for and provide the necessary paperwork. Employees will also need to provide the insurance carrier with appropriate documentation of the need for leave, such as a birth certificate or documentation from a family member's health provider, and complete the appropriate form regarding that documentation.

While employees are required to submit the necessary forms and documentation to the insurance provider, payments from the insurance provider will go directly to the Company. The Company will continue paying the employee through its regular payroll.

Any claim-related dispute with the insurance carrier, including eligibility, benefit rate, and duration of paid leave, arising under the NYSPFL may be subject to arbitration in accordance with the NYSPFL.

### **Retaliation and Reinstatement**

The Company has a policy not to retaliate against or discriminate against employees for taking Paid Leave and to reinstate employees to the position they held prior to leave or to a comparable position with comparable employment benefits, pay, and other terms and conditions of employment. Taking Paid Leave will not result in the loss of any employment benefit accrued prior to the date on which leave commenced; however, employees will not accrue seniority or employment benefits while on leave.

The right not to be discriminated against or retaliated against for taking certain leave is also protected under local, state, and federal law. The right not to be discriminated against or retaliated against for exercising any right under the NYSPFL and the right to be reinstated are also protected under the NYSPFL. Employees whose rights to PFL are violated by their employer have the right to file a complaint with the Workers' Compensation Board.

### **Health Insurance**

Employees will receive their existing health insurance benefits on the same terms for the duration of the Paid Leave as if they had not taken such leave. During leave, employees must continue to make all required premium contributions; the Company will continue to pay for any portion of the premium the Company pays for while the employee is not on leave.

### **Payroll Deductions**

Pursuant to the NYSPFL, PFL will be funded by modest employee contributions deducted from employees' paychecks. For 2018, these deductions will equal 0.126% of employees' wages, up to a maximum of \$1.65 per week. These deductions will be used only to pay for paid family leave coverage as required by law. Payments for TDI of up to 60 cents per week are also deducted in accordance with state law.

## **Interaction with Disability Benefits**

Employees retain all applicable rights to disability benefits under both New York State law and the Company's policy. Employees cannot collect both PFL and disability benefits at the same time. However, an employee who is simultaneously eligible for both PFL and disability benefits may choose how and whether to take those benefits sequentially, subject to all applicable rights and restrictions. Combined, PFL and disability benefits must not amount to more than the 26-week benefit maximum during any 52 consecutive calendar weeks.

## **Interaction with Leave Under the Family and Medical Leave Act ("FMLA")**

If an employee covered by the federal Family and Medical Leave Act ("FMLA") takes PFL or other leave under this policy for a purpose and under circumstances also covered by the FMLA, the Company may designate that period of leave as leave under the FMLA (i.e. may require that PFL or other leave under this policy and FMLA leave be taken concurrently). If the Company chooses to do so, the Company will notify the employee in writing, as required by law.

## **Compliance with All Applicable Laws**

Employees maintain all other applicable rights under city, state, and federal law, including but not limited to the FMLA, the Americans with Disabilities Act, the Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York City Human Rights Law, and the New York City Earned Sick Time Act. The Company will comply with all applicable legal requirements.

Eligible employees will receive all paid family leave required by law, and this policy will be interpreted and applied, in accordance with NYSPFL, regulations thereunder, and all other applicable laws, and to the extent that this policy may conflict with those laws they are controlling over these policies. Further, the Company retains all rights and defenses under applicable law, whether or not specifically set forth in this policy. The Company also reserves the right to change this policy at any time and provide only the leave required by law.

## **Seasonal or Temporary Employee Waiver**

Employees whose schedules will never reach 26 weeks or 175 days (as applicable) in a 52-week consecutive period, such as seasonal or temporary employees, have the option, but are not required, to waive their PFL rights and not make contributions. Employees may do so by completing a written form, copies of which the Company will provide. If an employee chooses to waive his or her rights and circumstances change such that the employee will be employed or work for 26 weeks or 175 days (as applicable), this waiver will be automatically revoked within 8 weeks of the change in circumstances. The employee whose waiver is so revoked will begin making contributions for PFL through payroll deductions, including any retroactive amounts due from date of hire, upon notification from the Company.

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<sup>1</sup> Paid family and medical leave benefits will begin in Washington, D.C. and Washington State in 2020.

<sup>2</sup> Eileen Appelbaum and Ruth Milkman, *Leaves That Pay: Employer and Worker Experience with Paid Family Leave in California*, CENTER FOR ECONOMIC AND POLICY RESEARCH, 8 (2011), available at <https://cepr.net/documents/publications/paid-family-leave-1-2011.pdf> (all sites last visited Dec. 29, 2017).

<sup>3</sup> Replacing an employee costs 50-75% of an hourly employee's annual pay and up to 150% of a salaried employee's annual pay. Jodie Levin-Epstein, *Getting Punched: The Job and Family Clock*, CENTER FOR LAW AND SOCIAL POLICY, 9 (2006), available at <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/0303.pdf>.

<sup>4</sup> *Leave that Pays* at 8.

<sup>5</sup> Eileen Appelbaum and Ruth Milkman, *Achieving a Workable Balance*, Center for Women and Work, 23 (2006), available at <http://www.mobilityagenda.org/achieve.pdf?attredirects=0>.

<sup>6</sup> 56% of employers with 10-19 employees and 59% of employers with 20-49 employees were in favor of the program. Ann Bartel et al., ACCESSING RHODE ISLAND'S TEMPORARY CAREGIVER INSURANCE ACT: INSIGHTS FROM A SURVEY OF EMPLOYERS, 7 (2016), available at [https://www.dol.gov/asp/evaluation/completed-studies/AssessingRhodeIslandTemporaryCaregiverInsuranceAct\\_InsightsFromSurveyOfEmployers.pdf](https://www.dol.gov/asp/evaluation/completed-studies/AssessingRhodeIslandTemporaryCaregiverInsuranceAct_InsightsFromSurveyOfEmployers.pdf).

<sup>7</sup> See, e.g., Lawrence M. Berger et al., *Maternity Leave, Early Maternal Employment and Child Health and Development in the US*, THE ECON. J. 115, no. 501 (2005); Pinka Chatterji and Sara Makowitz, *Family Leave After Childbirth and the Mental Health of New Mothers*, 15 J. MENTAL HEALTH POLICY & ECON. 61 (2012).

<sup>8</sup> AMERICAN ACADEMY OF PEDIATRICS ET AL., CARING FOR OUR CHILDREN: NATIONAL HEALTH AND SAFETY PERFORMANCE STANDARDS, THIRD EDITION (2011).