



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE
SEX AND LAW COMMITTEE
AND CIVIL RIGHTS COMMITTEE**

A.8805 / S.8305 (Budget Article VII, Public Protection and General Government) – Parts M and N

AN ACT to amend the workers’ compensation law, in relation to providing benefits for prenatal care (Part M); to amend the workers’ compensation law and the insurance law, in relation to the New York state average weekly wage, and to increasing disability benefits (Part N)

THESE BUDGET PROVISIONS ARE APPROVED WITH RECOMMENDATIONS

The New York City Bar Association, by and through its Sex and Law Committee and Civil Rights Committee, commends Governor Hochul for proposing reforms to New York’s Paid Family Leave (“PFL”) and paid medical leave benefits (“Temporary Disability Insurance” or “TDI”) programs in her proposed 2025 Fiscal Budget. The Governor’s proposal includes vital improvements to both PFL and TDI that will help to combat maternal and infant mortality, and support pregnant and postpartum workers more generally, in addition to new parents and family caregivers.

The Committees support this initiative, which is well overdue. The United States has a maternal health crisis that disproportionately impacts Black women,¹ and it is getting worse: in 1999, there were roughly 505 maternal deaths in the United States; in 2019, there were some 1,210.² New York must take an active role in fighting back. One way to do that is to increase the ability of pregnant people to receive proactive, preventative medical care, which correlates to higher live birth rates, among other crucial benefits.³ People who are unable to access prenatal care are three to four times more likely to die from pregnancy-related complications than those who are provided care, and babies born to people who did not receive care are three times more likely to

¹ Donna L. Hoyert, Ph.D., Maternal Mortality Rates in the United States, Division of Vital Statistics, CENTERS FOR DISEASE CONTROL AND PREVENTION, 2020, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm> (All websites last accessed on Feb. 8, 2024).

² Fleszar LG, Bryant AS, Johnson CO, et al. Trends in State-Level Maternal Mortality by Racial and Ethnic Group in the United States. *JAMA*. 2023;330(1):52–61. doi:10.1001/jama.2023.9043.

³ Prenatal Care, Date for United States, March of Dimes, January 2022, <https://www.marchofdimes.org/peristats/data?reg=99&top=5&stop=34&lev=1&slev=4&obj=1>.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

have low birth weight and five times more likely to die in infancy.⁴ Many of these deaths are preventable.

While the Governor’s proposal is an excellent first step, it falls short of the support that pregnant workers and their families require to receive the care they need throughout pregnancy and beyond. The Committees believe that to fully realize benefits to maternal and infant health—not to mention women’s economic mobility⁵ and New York families’ financial security⁶—more changes must be made. Accordingly, the Committees strongly recommend that the final Budget adopt other essential reforms to PFL and TDI. These changes are particularly important to pregnant workers, who rely on TDI for pregnancy-based medical leave; women more generally, who are often primary caregivers; sexual and gender minorities, who ought to be able to care for, and be cared for by, chosen family, not just blood relations; and low-wage workers struggling to make ends meet at a moment of skyrocketing housing costs, medical expenses, and daily costs of living.

I. Eliminate the TDI Cap and Increase TDI Benefits

The TDI benefit amount has not increased since it was initially capped at \$170 per week in 1989. In 2024, it is wholly unreasonable to expect a family to survive on such a small amount, particularly low-wage workers who are unlikely to have savings sufficient to supplement this limited income. Indeed, individuals who are attempting to recover from a range of medical conditions, such as surgery, childbirth, mental illness, and long COVID, to name a few, may end up either unable to take the time they need to truly recover or alternatively, if they take the leave, fall behind on rent and medical bills, and become food insecure or even homeless. Notably, pregnant workers particularly depend on TDI: nearly 30% of TDI claims are pregnancy-related.⁷

New York is well behind its peer states, which provide paid medical benefits at least five times higher than New York.⁸ Even more strikingly, New York’s TDI benefit falls far short of its PFL benefit, which, in 2024, provides workers who need time off to care for a seriously ill loved one up to \$1,151 per week (and, unlike TDI, increases each year with inflation, since it is tied to

⁴ Cristina Novoa, Ensuring Healthy Births Through Prenatal Support: Innovations From Three Models, CENTER FOR AMERICAN PROGRESS, Jan. 31, 2020, <https://www.americanprogress.org/article/ensuring-healthy-births-prenatal-support/>.

⁵ See, e.g., Meghan Racklin & Molly Weston Williamson, With Contribution From Sherry Leiwant, Dina Bakst, And Cassandra Gomez, The Time Is Now: Building The Paid Family And Medical Leave New Yorkers Need 8 (2023), <https://www.abetterbalance.org/the-time-is-now> (describing the “women’s case” for reforming New York’s paid family and medical leave program and explaining that “strong benefits and protections are crucial to support women’s health [and caregiving responsibilities] while accounting for their economic needs”).

⁶ See, e.g., Chantel Boyens, Michael Karpman, & Jack Smalligan, Access to Paid Leave is Lowest Among Workers with the Greatest Needs, Urban Institute 10–11 (July 2022), <https://www.urban.org/sites/default/files/2022-07/Access%20to%20Paid%20Leave%20Is%20Lowest%20among%20Workers%20with%20the%20Greatest%20Needs.pdf> (explaining that workers without paid family and medical leave were more likely to be uninsured, food insecure, and struggle to pay rent, a mortgage, and a utility bill, and noting that “[n]early a quarter of workers without access to paid leave were not confident they could come up with \$400 to cover an unexpected expense”).

⁷ Racklin & Weston Williamson, The Time Is Now, at 8.

⁸ *Id.* At 11.

the statewide average weekly wage).⁹ That means the caregiver who needs time off work may receive *nearly seven times* more funds than the patient themselves.

Recommendation: We recommend that the Budget be amended to eliminate the TDI cap and immediately bring TDI in line with PFL. Practically, this means eliminating the proposed five-year “phase-in” changes to the TDI cap and making any change immediate, effective January 2025; eliminating the cap on TDI benefits for the full 26 weeks that workers can receive TDI, rather than only the first 12, as currently proposed;¹⁰ and ensuring that all 26 weeks of TDI gradually increase to keep pace with inflation and rising costs of living. Pending legislation, A.4053-B (AM Solages) / S.2821-B (Sen. Ramos), would do so.¹¹

II. Institute Progressive Wage Replacement Rate for TDI and PFL

In addition to being capped at such a low amount, TDI pays only 50% of a worker’s average weekly wage, which is insufficient for many workers to pay for basic living costs, not to mention medical bills. As with the \$170 cap, New York is again far behind its peers, which have instituted progressive wage replacement. “Progressive wage replacement” means that workers receive a higher percentage of their wages up to a point, and a lower percentage of their wages above that point, up to a total benefits cap. For example, Oregon provides 100% of workers’ wages up to a certain amount, and 50% of wages above that threshold amount; likewise, Connecticut provides 95% of workers’ wages up to a certain amount, and 60% thereafter.¹² Progressive wage replacement benefits all workers while ensuring that low-wage workers—those most likely to live

⁹ N.Y.S. Workers’ Comp. Bd., New York Paid Family Leave Updates for 2024, <https://paidfamilyleave.ny.gov/2024> (“Employees taking Paid Family Leave receive 67% of their average weekly wage, up to a cap of 67% of the current New York State Average Weekly Wage (NYSAWW). For 2024, the NYSAWW is \$1,718.15, which means the maximum weekly benefit is \$1,151.16.”).

¹⁰ Workers can receive up to 26 weeks of TDI, for as long as their health provider certifies them as unable to work due to their medical needs. The Governor proposes to eliminate the TDI cap for only the first 12 weeks, leaving workers who require 13-26 weeks of leave to receive only \$280 per week. This is untenable. As the New York Civil Liberties Union recently explained, “The number of weeks of TDI an individual receives is based on medical need. While the vast majority of workers will need twelve weeks or less, those whose medical conditions — including complicated pregnancies — prevent them from working for longer periods of time have no less need for a sustainable wage on week thirteen than they did on week four.” Testimony of the New York Civil Liberties Union Before the Joint Legislative Budget Hearing on Workforce Development 2 (Jan. 30, 2024), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-01/new-york-civil-liberties-union_0.pdf. As A Better Balance put it, “Cancer does not abide by a 12-week timeframe. Multiple sclerosis does not become less expensive at week 13. New York workers deserve a stable, consistent benefit they can count on if and when they need it.” Testimony of A Better Balance to the New York State Legislature 7 (Jan. 26, 2024), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-01/a-better-balance_0.pdf.

¹¹ S.B. S2821A (2023–2024), <https://www.nysenate.gov/legislation/bills/2023/S2821/amendment/B>.

¹² Or. Rev. Stat. § 8-13.3-501 *et seq.* (entitling workers to 100% of their wages up to 65% of the statewide average weekly wage, and 50% above that amount); Conn. Gen. Stat. § 31-493 *et seq.* (entitling workers to 95% of their wages up to 40 times the state minimum wage, and 60% above that amount); *see generally* A Better Balance, Comparative Chart of Paid Family & Medical Leave Laws in the United States 9 (Jan. 2, 2024), <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/> (describing a number of states with progressive wage replacement).

paycheck to paycheck, and thus least likely to have cash reserves on hand for unforeseen medical emergencies—receive a higher overall percentage of their wages.¹³

Recommendation: We recommend that the Budget be amended to institute progressive wage replacement. Currently, under the Governor’s proposal, the TDI wage replacement rate would gradually increase to 67% over five years. Instead, for both TDI and PFL, New York workers should be entitled to receive 90% of their average weekly wage up to an amount equal to 50% of the statewide average weekly wage and, thereafter, 67% of their average weekly wage, up to an overall cap equal to 67% of the statewide average weekly wage.¹⁴ (Sixty-seven percent of the statewide weekly wage, or \$1,151 in 2024, is the current cap for PFL.)¹⁵ Pending legislation, A.4053-B (AM Solages) / S.2821-B (Sen. Ramos), would do just that.¹⁶

III. Guarantee Job Protection and Health Insurance during TDI

Unlike paid family leave, TDI does not currently require an employer to hold a worker’s job or continue their health insurance while they receive TDI benefits. Essentially, this means that the worker may be legally fired during that time (assuming they are not protected by some other law), which is a major deterrent to taking time off to care for one’s own health needs. The lack of job protection is particularly harmful for pregnant workers. In our experience, they are frequently terminated when they take time off for pregnancy-related health needs and then may struggle to find new employment, given that they are visibly pregnant. Moreover, even if they do secure new employment, they are often no longer eligible for paid medical and bonding leave at their new job.

Recommendation: None. We commend the Governor for including this change in her budget proposal and urge the Legislature to support this provision.

IV. Eliminate the Six-Month Clock for Eligibility for PFL

At present, a worker is not eligible for PFL until they have worked for their current employer for roughly six months, regardless of how long they have been in the workforce generally. This is fundamentally unfair—New Yorkers pay for PFL through paycheck contributions, so even though an individual has already contributed to the program, they are precluded from using these benefits when they switch to a new job until six months after their relocation. Not only is this out of step with the changing nature of work in which individuals are increasingly likely to change jobs and/or face periods of unemployment, but it also is a deterrent to switching positions and thereby may lock workers into toxic work environments. Not

¹³ Racklin & Weston Williamson, *The Time Is Now*, at 14.

¹⁴ This is in line with the proposal in New York Senate Bill S2821B (A40353B), which the Committee also supports.

¹⁵ N.Y.S. Workers’ Comp. Bd., *New York Paid Family Leave Updates for 2024*, <https://paidfamilyleave.ny.gov/2024> (“Employees taking Paid Family Leave receive 67% of their average weekly wage, up to a cap of 67% of the current New York State Average Weekly Wage (NYSAWW). For 2024, the NYSAWW is \$1,718.15, which means the maximum weekly benefit is \$1,151.16.”).

¹⁶ S.B. S2821A (2023–2024), <https://www.nysenate.gov/legislation/bills/2023/S2821/amendment/B>.

surprisingly, it is particularly harmful for women who aim to advance their careers but are forced to stay in their current position to maintain their PFL eligibility.

Again, New York is an outlier with this policy. Almost all other states that have paid family and medical leave permit more flexibility for meeting eligibility requirements; these policies often allow eligibility to follow the worker rather than their employment with a specific employer. Furthermore, this restriction for PFL does not apply to TDI. TDI generally only requires that workers be employed for at least four consecutive weeks by a single employer, and previously qualified workers qualify immediately upon starting with a new covered employer. There is no reason that PFL should not be the same.

Recommendation: We urge the Governor and Legislature to adopt a proposal amending PFL’s tenure requirement to match TDI’s one-month tenure requirement. A.4053-B (AM Solages) / S.2821-B (Sen. Ramos) would do so.

V. Improve Protections for Self-Employed Workers

In 2016, New York recognized the importance of providing PFL for self-employed workers, allowing them to voluntarily opt into PFL coverage.¹⁷ However, regulatory decisions by the Department of Financial Services have resulted in the requirement that self-employed workers opt into coverage within 26 weeks of becoming self-employed by purchasing an insurance policy.¹⁸ Those who don’t meet that deadline may still opt in, but they have to wait a full two years before they can access PFL benefits.¹⁹ As a result, many self-employed individuals who are unable to meet, or are simply unaware of, the opt-in deadline are unable to access PFL benefits.

Recommendation: The Budget language should be clarified to permit self-employed workers to purchase PFL/TDI policies and become eligible to use benefits within one month, as long as they pay into the program for at least one year thereafter. A.4053-B (AM Solages) / S.2821-B (Sen. Ramos) would do so.

VI. Ensure that PFL Recognizes the Wide Variety of Family Forms

Currently, PFL defines “family member” to include only blood relatives, such as spouses, children, parents, and siblings. This definition is far too narrow given the diverse forms of families in New York, including blended families, LGBTQ families, and/or close loved ones who are not biologically related but who are relied on for care and support in times of need. This issue is also particularly salient for many aging adults who live alone.²⁰

¹⁷ N.Y. Workers’ Comp. Law § 212(4)(b).

¹⁸ Racklin & Weston Williamson, *The Time Is Now*, at 28.

¹⁹ 11 CRR-NY § 363.6(j).

²⁰ Approximately 31.2% of all households in the state consist of an individual who lives alone. *See* Selected Social Characteristics in the United States: New York, U.S. Census Bureau, 2022 American Community Survey 1-Year Estimates, Table DP02 https://data.census.gov/table/ACSDP1Y2022.DP02?g=010XX00US_040XX00US36. And more than 630,000 New York residents live with nonrelatives. *Id.*

Yet again, New York is falling behind its peer states' definitions of "family member." Paid family and medical leave laws in New Jersey, Connecticut, Oregon, Colorado, Washington, Minnesota, and Maine provide leave to care for loved ones with whom a worker has a close relationship equivalent to a family relationship.

Recommendation: The definition of "family member" should be amended to include blood relatives not already covered by paid family leave as well as "chosen family," defined as someone with whom the employee has a "close association" that is "the equivalent of a family relationship."

VII. Amend PFL and TDI To Allow New Yorkers to Have Flexibility When Taking Leave

TDI currently does not permit workers to use their leave intermittently (hourly or daily); they must use a continuous block of leave and are not even eligible for TDI during their first week of disability. As a result, workers cannot use TDI for necessary and important healthcare such as prenatal appointments, chemotherapy appointments, or any other outpatient treatment. Similarly, PFL can be taken only in increments of days, not hours. These arbitrary restrictions prevent workers from obtaining the healthcare needed for their or their loved one's medical conditions.

These limits on leave make New York an outlier among other jurisdictions: 12 out of 13 jurisdictions with paid family and medical leave programs allow workers to take leave on an intermittent basis.

Recommendation: The Budget should be amended to permit workers to take TDI intermittently and allow workers to use both TDI and PFL in increments as short as an hour, as A.4053-B (AM Solages) / S.2821-B (Sen. Ramos) would allow.

VIII. Provide for Protection From Interference and Retaliation for Exercising Rights under PFL and TDI

New York workers have limited protection from retaliation for exercising their right to take PFL and no protection for taking TDI.²¹ As a result, in our experience they are subject to being penalized for taking their leave and/or are misinformed—or not informed—about their rights to TDI benefits. Too often, we hear from workers who are afraid to apply for benefits because they fear that they will be punished for doing so.

Recommendation: Protections from interference and retaliation should be strengthened by, among other things, making it unlawful for an employer to threaten to penalize an employee for taking leave, including by reporting their immigration status, and making it unlawful for an employer to fail to complete the paperwork necessary for an employee to take leave.²² Proposed language for such reforms may be found in A.4053-B (AM Solages) / S.2821-B (Sen. Ramos).

²¹ N.Y. Workers' Comp. Law § 203-a (prohibiting retaliation for taking PFL but not prohibiting interference with one's attempts to take PFL); *id.* § 203-b (requiring reinstatement following PFL but not TDI).

²² Proposed S2821B (A40353B) offers a model for such language. *See, e.g.*, S2821B ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this

IX. Ensure the Automatic Conversion of Family Leave Claims into TDI Claims For a Pregnancy or Neonatal Loss

Parents who suffer the loss of a pregnancy or the loss of a child after they already applied for PFL, or were already receiving PFL, lose eligibility for PFL. They then must go through a second, time-consuming and traumatizing TDI application process to obtain benefits to recover medically or to address any mental health consequences—at a moment when they are already grieving the loss of their pregnancy or child. No parent should have to do that.

Recommendation: A provision should be included in the PFL law to ensure that in cases of neonatal loss or stillbirth, a worker’s paid family leave claim is automatically converted into a TDI claim.

X. Add 40 Hours of Prenatal Care to the State’s Paid Sick Time Law, rather than to the Paid Family Leave Law

The Governor’s proposal currently adds 40 hours to the PFL law for a worker to receive prenatal care during their pregnancy. This additional 40 hours is incredibly important, allowing workers to be able to receive paid, job-protected time off to attend routine prenatal appointments, as well as timely treatment for pregnancy complications, protecting them from severe consequences that can occur when a pregnant woman does not receive adequate monitoring and treatment during her pregnancy.

Recommendation: Instead of shoehorning the 40 hours into PFL, we recommend adding the 40 hours to the state’s sick time law.²³ There are multiple reasons to do so. First, the Governor’s proposal as currently drafted defines “prenatal care” broadly but could be construed to limit prenatal leave to 40 hours, rather than making clear that prenatal leave is an additional 40 hours and that, if this is used up, a pregnant worker could also then take TDI.²⁴ Second, applying for paid family leave benefits is administratively taxing, time-consuming, and overwhelming, requiring paperwork from the worker, the worker’s healthcare provider, the employer, and the employer’s family leave insurance carrier, etc. No such process would be required for using sick time; a worker would simply have to inform their employer of their need for the time. A worker should not have to complete such a burdensome process every time they need to attend a routine prenatal appointment. Third, and finally, PFL is leave to care for another person, not for the individual taking the leave. Because prenatal care is care for oneself, categorizing it as leave to care for another person (presumably, the fetus) is inappropriate and could be utilized by anti-abortion advocates to advance dangerous fetal personhood arguments.

article . . . Any eligible employee of a covered employer who takes leave, including leave due to a disability, under this article shall be entitled, on return from such leave, to be restored by the employer to the position of employment . . .”).

²³ If the Governor’s budget repeals COVID paid sick time, as she has proposed, and the 40 hours of sick time for prenatal leave could easily be substituted for COVID sick time.

²⁴ If the Governor chooses not to add it to sick time law, it could also be made clear in the law that TDI is available if needed and can be used for prenatal appointments.

In sum, while the City Bar commends the Governor’s proposal, we urge the Budget be amended to: (1) increase the cap on paid medical leave (TDI) benefits immediately; (2) implement progressive wage replacement for paid family and medical leave benefits; (3) reduce the sick-month tenure clock for eligibility for paid family leave benefits; (4) adopt key protections for self-employed workers; (5) adopt an inclusive definition of “family member”; (6) permit workers to use their leave incrementally, in units of time as short as one hour; (7) support workers experiencing a pregnancy loss or neonatal loss by including a provision in the PFL law to automatically convert a PFL claim to a TDI claim in such cases; and (8) make technical changes to the prenatal care proposal to ensure that it does not inadvertently harm the pregnant workers it is intended to help. All these reforms are critical for New York to meaningfully improve maternal and infant health, boost women’s economic mobility, and meet New York families’ needs at a moment of skyrocketing housing costs and daily costs of living.

Sex and Law Committee

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February 2024

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