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HR's Top Task for 2017: Prepare for New York Paid Family Leave

Paid Family Leave arrives in New York on January 1, 2018, and employers should soon begin to prepare. Enacted as part of the 2016 state budget process, New York's Paid Family Leave Law ("PFL") gives employees in New York access to job-protected paid time off (1) for the birth, adoption, or placement of a new child; (2) to care for a family member with a serious health condition; or (3) for a qualifying exigency (as defined in the federal Family Medical Leave Act). The leave entitlement and benefits will be phased in, starting with 8 weeks leave at 50% pay in 2018 (capped at 50% of the state's average weekly wage) and rising to 12 weeks leave at 66.7% of pay in 2021. All private employers covered by the Workers' Compensation Law are covered by PFL. Employees must be employed for 26 weeks full-time or 175 days part-time to qualify for leave. Employers must maintain an employee's health insurance during the leave (subject to the employee continuing to pay his/her share of the premium.)

Note the name of the law: paid **family** leave. The law does not cover the employee's own serious health condition; rather, it is designed to supplement the state's existing disability insurance program. PFL is intended to run similarly to that program. Disability insurance carriers will be required to provide PFL coverage, employees will submit requests for PFL to those insurance carriers and the carrier will decide if the requested leave qualifies for coverage under the law. Alternatively, employers can choose to self-insure. PFL will be 100% funded by employee payroll deductions.

The New York State Workers' Compensation Board released proposed regulations concerning the law in February and accepted comments for a forty-five-day period. The comment window closed in early April. It is unknown when

the final regulations will be published, or to what extent there will be changes from the proposed regulations.

A few aspects of the proposed regulations are worth noting.

- Employers who already provide some form of paid time off (such as PTO, sick or personal time) cannot *require* employees to use accrued paid time off for the requested PFL time. It can offer the option and then, if the employee elects this option, seek reimbursement from the insurance carrier. If the employee elects to use accrued paid time, the employee is still entitled to be reinstated. Alternatively, the employee can opt for the lower PFL insurance payment and save PTO for another day.
- Disability and PFL will not run concurrently. This means that in the case of maternity leave, an employee could collect disability payments for the first 6-8 weeks of leave (which would not be a PFL covered absence), and then transition to PFL for an additional 12 weeks of job-protected paid leave, for a total of 18-20 weeks off with partial pay.
- PFL and FMLA leave will run concurrently. FMLA-covered employers will need to consider how to incorporate the PFL claims process into its existing FMLA processes.
- Unionized employers with leave provisions in their collective bargaining agreement that are at least as favorable to employees as the PFL program are exempt from the law. However, it is not clear who will make the determination of whether the CBA's benefits are sufficiently favorable.

Since the regulations are still only in proposed form, it is premature to begin drafting and revising leave policies. However, it is not too early to take an inventory of current leave practices and policies and anticipate how they might need to change. Once the final regulations are published, it will be critical for employers to act quickly. Among other things, employers will be required to provide employees with written details of how PFL benefits are administered. Those written details will need to reflect the processes set forth in the final PFL regulations.

Kristen E. Smith is a labor and employment attorney with Bond, Schoeneck & King, PLLC, in Syracuse. Kristen works with employers, large and small, to help ensure compliance with state and federal labor and employment laws. She is also an employment litigator, defending employers from discrimination, wage and hour, contract and related employment claims. Kristen can be reached at smithk@bsk.com.