

FAMILY & MEDICAL LEAVE IN A CHANGING LEGAL ENVIRONMENT

Jaclyn G. Goldberg
Keane & Beane, P.C.
445 Hamilton Ave.
White Plains, NY 10601
914-946-4777

Evan Hudson-Plush
Cohen, Weiss and Simon LLP
900 Third Avenue
New York, NY 10022
212-356-0254

Agenda

- This presentation will address two overlapping leave laws:

	Family and Medical Leave Act	New York Paid Family Leave Benefits Law
Jurisdiction	Federal	New York State
Year Enacted	1993	2016; effective 1/1/18
Benefit	Unpaid Leave	Paid Leave
Length of Leave	12 weeks	8 weeks in 2018 (12 weeks starting in 2021)

Family Medical Leave Act (FMLA)

The Family and Medical Leave Act is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons.

It has been in place since 1993.

Coverage Overview

- Employers

- Private employers with at least 50 employees
- Public agencies and elementary and secondary schools

- Employees

- Three criteria:
 - Worked for employer at least 12 months; and
 - Have at least 1,250 hours of service in 12 months before taking leave; and
 - Work at location where employer has at least 50 employees within 75 miles of worksite

Leave Entitlements

- ◎ Eligible employees may take up to 12 weeks of unpaid leave in a 12-month period for one or more of the following reasons:
 - Birth and Bonding: the birth of a child or placement of a child for adoption or foster care, and to bond with the newborn or newly-placed child;
 - Care: to care for a spouse, child, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
 - Medical Leave: for a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care [this leave is not covered under the NY PFLBL]; or
 - Military: for any qualifying exigency related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

Eligible employees may take up to 26 weeks of leave in a 12-month period to care for a covered service member with a serious injury or illness.

Birth and bonding

- Leave to bond with a newborn child or for a newly placed adopted or foster child must conclude within 12 months after the birth or placement.
- Mothers and fathers have the same right to take FMLA leave to bond with a newborn child.

Intermittent/reduced leave schedule

- When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule.
- Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.
- Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not disrupt the employer's operations, subject to the approval of the employee's health care provider.

Serious health condition

- The most common serious health conditions that qualify for FMLA leave are:
 - Conditions requiring an overnight stay in a hospital or other medical care facility;
 - Conditions that incapacitate an employee or his/her family member for more than three consecutive days and have ongoing medical treatment;
 - Chronic conditions that cause occasional periods when an employee or his/her family member are incapacitated and require treatment by a health care provider at least twice a year; and
 - Pregnancy.

Certification

- An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider.
- The employer must allow the employee at least 15 calendar days to obtain the medical certification.
- In general, the employer may request the employee to provide a recertification no more often than every 30 days and only in connection with an absence by the employee.
- Additionally, employers may request a new medical certification each leave year for medical conditions that last longer than one year.

Job restoration

- On return from FMLA leave, the employer must return the employee to the same job, or one that is nearly identical.
- If not returned to the same job, a nearly identical job must:
 - Offer the same shift or general work schedule, and be at a geographically proximate worksite;
 - Involve the same or substantially similar duties, responsibilities, and status;
 - Include the same general level of skill, effort, responsibility and authority;
 - Offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and
 - Offer identical benefits.

Employee notice

- Employees seeking to use FMLA leave are required to provide 30-days' advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable.
- Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.
- When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA.

Employer Notice

- Employers must post a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints.
- When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his or her rights and responsibilities under the FMLA.

In addition to providing eligible employees an entitlement to leave and restoration to their previous jobs, the FMLA

- Requires that employers maintain employees' health benefits during leave.
- Protects employees from interference and retaliation for exercising or attempting to exercise their FMLA rights.
- Includes certain employer recordkeeping requirements.

The Paid Family Leave Benefits Law ("PFLBL") (L. 2016, Ch. 54, Part SS)

The PFLBL is a state law that provides eligible employees of employers with paid, job-protected leave for specified family and medical reasons.

Structured as an insurance benefit.

Effective January 1, 2018.

Covered Employers

- Private Employers

- All private employers, regardless of size
(compare to 50-employee FMLA requirement)

- Public Employers

- Public employers have the option of providing Paid Family Leave.
 - A labor union may collectively bargain with a public employer to offer Paid Family Leave benefits.

Employee Eligibility

- Full-time employees:
 - If an employee works a regular work schedule of 20 or more hours per week, he/she is eligible after 26 consecutive weeks of employment.
- Part-time employees:
 - If an employee works a regular work schedule of fewer than 20 hours per week, he/she is eligible after working 175 days, which do not need to be consecutive.
- Regardless of citizenship or immigration status

Out-Of-State Employers and Employees

- An employer with one or more employees working in New York for 30 or more days in a calendar year must obtain Paid Family Leave coverage.
- Family Leave is a benefit for people who work in New York; it does not matter where the employer is headquartered or where the employee lives.
 - An employee working from their home in NY for an employer located in NJ is covered.
 - An employee who usually works outside NY but occasionally comes into NY is likely not covered.
 - An employer located in NJ does not need to cover employees who live in NY but work in NJ.

Self-Employed Individuals

(Sole-Proprietors & Independent Contractors)

- Sole-Proprietors

- Paid Family Leave is a benefit for employees.
- If an individual works for himself/herself, he/she is not required to have Paid Family Leave.
- But sole-proprietors *may* purchase coverage
 - The process for self-employed individuals to voluntarily obtain Paid Family Leave coverage for themselves depends on whether or not you have employees (for whom coverage is mandatory).

- Independent Contractors

- Independent contractors are not considered employees for purposes of PFLBL, which means that employers are not required to cover them under their policies.

Funding

- Fully funded by employee contributions
 - For 2018, payroll deductions of 0.126% of employee's weekly wage capped at NYS average weekly wage
 - Maximum is \$1.65 per week
- Employers are not required – *but may* – fund paid family leave benefits through employer contributions.

Effective Date	Number of Weeks of Leave (within any 52-week calendar period)	Amount of Paid Leave
January 1, 2018	8 weeks	50% of the employee's weekly paid, capped at 50% of the New York State Average Weekly Wage
January 1, 2019	10 weeks	55% of weekly pay, capped at 55% of the State Average Weekly Wage
January 1, 2020	10 weeks	60% of weekly pay, capped at 60% of the State Average Weekly Wage
January 1, 2021	12 weeks	67% of weekly pay, capped at 67% of the State Average Weekly Wage

Note: The New York State Average Weekly Wage (NYSAWW) for calendar year 2018 is \$1,305.92 (\$68,907 annually)

2018 Examples

Weekly Salary	Weekly PFL Contribution	Max PFL Time Off	Weekly Pay on PFL	Max Paid Benefit
\$1,000 (\$52,000/yr)	\$1.26 (\$65.52/yr)	8 weeks	\$500.00	\$4,000.00
\$1,305.92 (\$68,907 /yr)	\$1.65 (\$85.56/yr)	8 weeks	\$652.96	\$5,223.68
\$2,000 (\$104,000 /yr)	\$1.65 (\$85.56/yr)	8 weeks	\$652.96	\$5,223.68

Determining Benefits

- An employee's average weekly wage is computed by adding his/her wages for the 8 weeks prior to the start of Paid Family Leave, and dividing the total by 8.
- An employee is not entitled to continue to accrue Paid Time Off while out on Paid Family Leave, but the law and regulations do not prohibit the employer from allowing the employee to continue accruing leave.
- When an employee changes employers, he or she must re-establish eligibility with the new employer.

Employees may take leave for one or more of the following reasons:

- Caring for close relatives with a serious health condition
- Bonding with a child (during the first 12 months after the child's birth or placement);
 - Paid Family Leave only begins after birth and is not available for prenatal conditions.
- Assisting family when service member is deployed abroad
 - An employee cannot use Paid Family Leave for his/her own qualifying military event.

Unlike the FMLA, leave is not available to care for the employee's own serious health condition.

Definitions

- “Close relative” – Child, parent, grandparent, grandchild, spouse, domestic partner, stepchild, parent-in-law.
- “Serious health condition” – 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.

How to Apply

- Employee must provide at least 30 days notice if foreseeable (if not, as soon as possible).
- Employee should request and submit to the employer the Request For Paid Family Leave (Form PFL-1).
- Employer must fill out its section of the form and return it to the employee within 3 business days.
- Employee then submits Form PFL-1 and support document to the employer's Paid Family Leave insurance carrier.
- The insurance carrier must pay or deny the employee's request within 18 calendar days of receiving the completed request.

Required Supporting Documentation

- When requesting Paid Family Leave, an employee will also need to file documentation in support of his/her Paid Family Leave request. The specific documentation required varies based on the type of leave, as outlined below:

Type of Leave	Documentation
Birth of Child (Birth Mother)	<ul style="list-style-type: none">Birth certificate; orDocumentation of pregnancy or birth from health care provider.
Birth of Child (Second Parent)	<ul style="list-style-type: none">Birth certificate, or if not available, a voluntary acknowledgment of paternity or court order of filiation; orA copy of documentation of pregnancy or birth from a health care provider and a second document verifying the parent's relationship with the birth mother or child
Foster Care	<ul style="list-style-type: none">Letter of placement issued by the department of social services or local voluntary agency.
Adoption	<ul style="list-style-type: none">Legal evidence of adoption process.
Serious Medical Condition	<ul style="list-style-type: none">Certification from the care recipient's health care provider.
Military	<ul style="list-style-type: none">US Department of Labor Military Family Leave Certification;Copy of Military Duty Papers.

Opting Out/Waivers

- Generally, employees may not opt-out of Paid Family Leave coverage.
- However, employees can opt out of Paid Family Leave if they do not expect to work for their employer for the minimum amount of time required for eligibility.
 - Such an employee may submit a Paid Family Leave waiver, which may be filed when:
 - Full time: he/she will not work 26 consecutive weeks; or
 - Part time: he/she will not work 175 days in a 52 consecutive week period.
- Employers should keep completed waivers on file.
- An employee's waiver will be automatically revoked if his/her schedule changes, or he/she may voluntarily revoke it at any time. Once revoked, the employee owes retroactive contributions back to his/her date of hire.

Notice Requirement

- 30 Days' Notice Required

- In any case in which the necessity for family leave is foreseeable based on an expected birth or placement, or on planned medical treatment, the employee must provide the employer with no less than 30 days' notice before the date the leave is to begin.
- If the employee becomes aware of the necessity for family leave less than 30 days before the date the leave is to begin, the employee must give such notice as is "practicable."

Intermittent Leave

- Paid family leave may be available to employees for leave taken intermittently or for less than a full work week in increments of one full day or one-fifth of the weekly benefit.
- When an employee takes intermittent family leave the employer may require the employee to provide notice as soon as is practicable before each day of intermittent leave.

Concurrent Leave

- FMLA Leave:
 - Unless otherwise expressly permitted by the employer, FMLA benefits must be used concurrently with paid family leave benefits.
 - Employees may not “stack” leave time to take over 12 weeks, or the maximum duration of leave permitted at the time.
- Short-Term Disability:
 - Employees may take both paid Family Leave time and temporary/short-term disability, but not at the same time.
 - Employees cannot take more than 26 weeks of combined short-term disability and Paid Family Leave in a 52-week period.
- Employees who have accrued unused “vacation or personal leave” at the time they intend to take paid family leave may choose whether to charge their paid time off and receive their full salary, or, to not charge their paid time off accrual and instead receive paid family leave benefits.
- Maternity Leave/Paternity Leave

Concurrent Leave for Birth of a Child

- Employee may be eligible for *both* Short Term Disability (DBL) and Paid Family Leave, but not at same time (up to 26 weeks in 52-week period)
- DBL is typically 6 weeks for normal delivery and 8 weeks for C-section (plus any time of disability prior to delivery).
- Employees can aggregate FMLA and PFL
 - FMLA (potentially concurrent with DBL and/or sick leave) during period of employees own serious health condition (e.g., disability due to pregnancy or birth), *plus*
 - 12 weeks of PFL for child bonding [when phased in]

Employees Not Eligible to Receive Benefits

- An employee who is receiving total disability payments pursuant to a claim for workers' compensation, volunteer firefighters' benefits or volunteer ambulance workers' benefits;
- An employee who is not employed or is on administrative leave from his/her employment;
- An employee during periods when the employee is collecting sick pay or paid time off from the employer;
- An employee seeking paid family leave for any day in which he/she works at least part of that day for pay for any employer; or
- An employee seeking paid family leave to care for the same family member as another employee of the employer seeking paid family leave.

Complaints

○ Benefit/Denial Disputes

- If request denied, may request to have the denial reviewed by a neutral arbitrator.
- Arbitration will be handled by NAM (National Arbitration and Mediation).
- The employee's insurance carrier (or employer, if self-insured) will provide the employee with the reason for denial and information about requesting arbitration, or the employee can visit the arbitrator's website at www.nyspfla.com.

Complaints

- Protection from Discrimination and Retaliation
 - An employer cannot discriminate or retaliate against an employee for requesting or taking Paid Family Leave.
 - The employer must reinstate an employee to the same or a comparable position when he/she returns from Paid Family Leave.
- If an employee requests or takes Paid Family Leave and the employer:
 - Does not return the employee to his/her same or a comparable job,
 - Terminates his/her employment,
 - Reduces his/her pay or benefits, or
 - Disciplines him/her in any way.
- The employee must follow the steps outlined in the following process:

Request for Reinstatement:

- First, the employee should request that his/her employer reinstate him/her to the same job, or a comparable one.
- The employer has 30 calendar days to respond to the request.

Discrimination/Retaliation Complaint:

- If the employer does not comply with an employee's Request For Reinstatement within 30 calendar days, the employee has the right to a hearing with the Workers' Compensation Board.
- To request a hearing, an employee must file a discrimination/retaliation complaint.
- The Board will assemble the case and reach out to the employee to schedule a hearing within 45 calendar days.
- NOTE: To file a discrimination complaint, the employee must have first requested reinstatement as described in the first step above.
- An administrative law judge may order an employer to reinstate an employee, pay any lost wages, pay attorney's fees, and pay up to \$500 in penalties.

Wage Deduction Complaints

If an employee believes there is an error with his/her current payroll deduction, the employee should raise the issue with the employer. If the employer fails to address the issue, the employee can file a complaint online or call the Paid Family Leave Helpline at 844-337-6303.

Tax Implications

- Employee deductions taken from *after-tax wages*
- Benefits are taxable non-wage income that must be included in federal AGI
- Employees can request voluntary tax withholding (not automatic)

Other Requirements: Similar to FMLA

- **Reinstatement**

- Any eligible employee who takes paid family leave under the PFLBL shall be entitled, on return from such leave, to be restored “to the position of employment held by the employee when the leave commenced,” or “to be restored to a comparable position with comparable employment benefits, pay and other terms and conditions of employment.”
- Unlike the FMLA, the PFLBL provides no exemptions from the reinstatement requirement.

- **Maintenance of Health Insurance**

- During any period of family leave the employer must maintain any existing health benefits of the employee in force for the duration of such leave as if the employee had continued to work from the date he or she commenced family leave until the date he or she returns to employment.

FMLA v. PFL: Key Differences

	PFLBL	FMLA
Benefit	Paid	Unpaid
Coverage	1+ NY employee	50+ employees
Eligibility	After 26 weeks (full time) or 175 days (part time)	12 months employment and 1,250 hours in LTM
Coverage for Own Serious Health Condition	No	Yes
Children	Can be used for child of any age	Only for care of child < 18 or "incapable of self-care" because of disability
Grandchildren, Grandparents, Domestic Partners	Covered	Not covered
Paid Time Off	No substitution (forced use of PTO) unless also-FMLA qualified	Forced substitution permissible
Increments	1-day increments for any reason	Partial-day increments permitted with minimum duration defined by employer, when medically necessary
Medical certification	Employee must provide, even for bonding	Employer may require
Who determines eligibility	Insurance carrier	Employer
Interplay with Disability Benefits	May not run concurrently	May run currently

Hypo 1

1. Janis is pregnant and is having complications due to her pregnancy. Can she take paid family leave or FMLA leave?
2. Once Janis has her baby, can she take paid family leave or FMLA leave?
3. Can her employer require her to take paid family leave and FMLA leave concurrently?
4. Is Janis eligible for any temporary disability benefits before or after having her baby?
5. Can Janis's partner, Joan, who works with Joan at the same company, take paid family leave or FMLA leave to bond with their new baby?
6. If Joan takes 8 weeks of paid family leave to bond with the new baby, can Joan take any additional leave two months later to care for a sick relative?

Hypo 2

- Woodstock Co. employs Arlo. Arlo has been out for two weeks. He has told his supervisor that he has a really bad case of the flu.
1. Can Woodstock Co. unilaterally designate Arlo's leave as paid family leave or FMLA leave?
 2. If Arlo is out of sick days and wants to use FMLA leave, can Woodstock Co. require that Arlo provide medical documentation?

Hypo 3

1. Jimi gets a contract to work full-time for Jefferson Airplanes for 16 weeks. Does Jimi have to pay deductions as part of the paid family leave program?
2. What if Jimi also keeps his part-time job working for an hour on Saturdays and an hour on Sundays for Sweetwater? Jimi has worked this schedule for Sweetwater for the past decade.
3. What happens if Jefferson Airplanes extends Jimi's contract by an additional 20 weeks?

Hypo 4

- ◎ Ravi makes \$500 a week performing sitar as a part of a local orchestra.
1. What will his paid family leave pay roll deduction be?
 2. How much money per week will he receive if he uses paid family leave to take care of his sick father?
 3. What if he makes \$2,500 a week?