

NEW YORK PAID FAMILY LEAVE LAW

What employers need to know about the New York Paid Family Leave law

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This is a general overview of the topic. To find out how this information might affect your benefits plan, we encourage you to consult your own legal counsel specializing in labor and employment law to ensure your organization has met all of the requirements of the New York Workers' Compensation laws. Sun Life does not provide legal or tax advice.

All employers who have at least one employee whose primary work location is in New York State must comply with New York's new Paid Family Leave law ("NY PFL law"). Employers and insurers are working hard to ensure that they comply with the requirements of the NY PFL law, and that they also take steps to best protect themselves under the law.

Sun Life has created this practical guide for employers to help them through NY PFL law implementation.

The NY PFL law

Certain employees whose primary work location is in New York State are eligible for up to twelve weeks of compensation, benefits, and job-protected leave in any 52-week period to care for covered family members for certain purposes. The duration and benefit amounts have increased annually from 2018 through 2021. The state of New York recently announced the 2021 calendar year increase of a benefit duration of up to twelve weeks and an income replacement ratio of 67%.

Who are covered employers?

The NY DBL and PFL laws apply if an employer has one or more employees for 30 calendar days in New York State. In contrast, the Family and Medical Leave Act (FMLA) applies to private Employers with 50 or more employees are within a 75-mile radius. The NY DBL and PFL laws do not apply to public employers or to an executive officer of an incorporated religious, charitable, or educational institution and persons engaged in a professional or teaching capacity in or for a religious, charitable, or educational institution.

Who are covered employees?

Employees of a "covered" employer who have worked at least four consecutive weeks are covered by the NY PFL law.

Are both full- and part-time employees eligible?

Both full- and part-time employees are eligible. An employee who has worked for 20 or more hours per week for 26 or more consecutive weeks is eligible for benefits. An employee who is scheduled to work less than 20 hours per week is eligible after working for 175 days. There is no time limit on when the 175 days must be worked (i.e. it need not be completed with a 52 week period). The 26 weeks of consecutive employment includes scheduled vacation time, the use of personal, sick, or other time away from work that has been approved by the employer, or another period when the employee is away from work but is still considered to be an employee by the employer, as long as the employee has continued to make NY PFL contributions while away from work. The 26 weeks does not include time away from work for which the employee will receive NY DBL benefits.

Can employers offer NY PFL without an insurer?

Yes. Employers can either self-administer/self-insure the NY PFL or contract with an insurer to do so.

What are the purposes for which NY PFL can be used?

NY PFL can be used for any of the three following purposes:

- To bond with a newborn or newly adopted or newly placed foster child within the first 12 months after childbirth, adoption, or placement
- To care for a family member with a serious health condition
 - Please note that NY law makes clear that “transplantation preparation and recovery from surgery related to organ or tissue donation” are included within the definition of serious health condition.
- To address a qualifying exigency caused by a spouse, child, domestic partner, or parent is called to active military duty.

What family members are covered?

Employers need to be mindful that the category of covered family members under the NY PFL law is broader than that of the Family and Medical Leave Act (FMLA). In addition to children, spouses, and parents, the law’s protections also extend to domestic partners, parents in law, grandparents, and grandchildren.

Can employees take NY PFL as intermittent leave?

NY PFL may be used on an intermittent-leave basis in increments of no fewer than one day or more. However, if an employee works any part of a day, he or she is not eligible for NY PFL for that day. Employees are required to identify the dates for intermittent leave in their NY PFL request. If dates are not provided, payment may be delayed until the dates are submitted. Employees must submit requests for NY PFL benefits within 30 days of the absence.

The WCB regulations for the NY PFL provide that an employer may elect to track hours taken for FMLA for any day in which the employee is paid, works at least part of the day, and is thus not eligible for NY PFL. Under the Workers’ Compensation Board (WCB) regulations, when the total hours taken for FMLA in less than full-day increments reaches the number of hours in an employee’s usual workday, the employer may deduct one day of NY PFL benefits from an employee’s annual available NY PFL benefit allotment. The WCB regulations provide that employers are not entitled to be reimbursed by carriers for such paid FMLA hours.

Does the law cover employees who work outside New York State?

In certain circumstances employees who work both in and outside New York State may be covered under the NY PFL. The NY PFL law covers employees who work for at least four weeks in New York State for a covered employer, provided that the employee’s primary work location is in New York State.

Can any employees “opt out” of NY PFL coverage?

In most cases, employees working full- or part-time are not allowed to waive coverage in the NY PFL program. The only exceptions are if (1) an employee’s schedule is 20 hours or more per week but the employee will not work 26 weeks in a 52-consecutive-week period or (2) the employee’s schedule is fewer than 20 hours per week and the employee will not work 175 days in a 52-consecutive-week period. However, if the employee subsequently meets either of these thresholds, the employer must start making payroll deductions and may collect back premiums.

If the employee meets either of those exceptions he or she must be provided, in writing, an option to waive NY PFL benefits and thereby become exempt from the obligation to have payroll deductions. However, if the employee subsequently becomes eligible, the waiver is revoked and payroll deductions must begin. Further, an employer may take steps to collect prior payroll contributions that were due back to the first day of employment. The WCB has created a PFL waiver form.

What is the amount of the payroll deduction?

The New York State Department of Financial Services (NY DFS) has established that the maximum employee contribution for 2021 is 0.511% of an employee’s weekly wage, up to but not to exceed the statewide average weekly wage, which, has been established by the New York State Department of Labor as \$1,450.17 for 2021.

Can employers cover their employees’ contributions?

Yes, employers may elect—but may not be forced—to cover the premium costs for employees. If employers do so, this may result in taxable income to employees. We recommend that you consult a qualified accountant or tax attorney.

What are the annual increases of leave and benefit payments?

NY PFL benefits are scheduled to increase on January 1 of each year through January 1, 2021. The schedule for the increases is below:

Year	# Weeks per 52-Week Period	Benefit % of Employee Average Weekly Wage	Cap on Benefit as % of State Average Weekly Wage
2018	8	50%	50%
2019	10	55%	55%
2020	10	60%	60%
2021	12	67%	67%

Under the NY PFL law, if an employee is out on a leave that carries over into the next calendar year, the benefit that was in effect when the leave began will continue to be applicable. For example, if an employee commences a continuous leave in 2020, the 2020 benefit amounts will continue to apply if the leave carries over into 2021.

The 52-week period is measured retroactively with respect to each day for which NY PFL benefits are claimed.

What are wages?

Wages include every form of remuneration for employment paid by the employer to the employee, whether paid directly or indirectly, including salaries, commissions, bonuses, and the reasonable money value of board, rent, housing, lodging, or similar benefit received. Tips are also included if the employee’s position is one in which tips customarily constitute part of the employee’s compensation. Wages do not include amounts made to or on behalf of an employee by the employer for benefits such as health and medical insurance, disability insurance, or retirement plans.

How does the NY PFL law interact with other laws?

Employees may not use NY PFL while they are collecting either workers' compensation or NY DBL benefits. Employees are eligible for a total of 26 weeks of combined NY DBL and NY PFL in any 52- consecutive-week period, although the leaves may not be taken at the same time. Therefore, if an employee took 12 weeks of NY PFL, he or she would only have 14 weeks of NY DBL available for that 52-week period.

If an employee is eligible for leave under the FMLA, the employer may require that NY PFL benefits be taken concurrently with FMLA benefits.

If the Company designates a period of leave to be covered by the FMLA for a reason also eligible for NY PFL, and if the Company informs the employee of his or her eligibility for NY PFL benefits and the employee declines to file a request for NY PFL benefits, the Company may count the FMLA leave against the employee's maximum duration of NY PFL.

Can a woman take both NY DBL and NY PFL following childbirth?

Yes. Women who deliver a newborn may take NY DBL for their own medical recovery on account of the delivery. They may then take their NY PFL Bonding benefits at the expiration of the six or eight weeks of NY DBL benefits. Alternatively, a mother may choose to forgo NY DBL benefits for recovery and go straight to PFL benefits. It is the employee's option to decide which type of NY statutory leave to take after the delivery of a child. If an employee takes NY PFL first, she will, in all likelihood, forfeit the right to take NY DBL for the delivery (unless there are complications following delivery which render her disabled for a longer period than is typical).

How does the NY PFL law interact with employer paid time off policies?

Employers may offer employees the option to charge all or part of their family leave time to accrued but unused vacation or personal leave and receive full salary in lieu of receiving the NY PFL benefit. Employers are entitled to be

reimbursed by insurers if they pay full wages under PTO or other paid-leave policies when an employee is eligible for NY PFL. Employers may not require an employee to use available PTO before using NY PFL benefits.

How does the NY PFL law interact with collective bargaining agreements?

Employees may be exempt from NY PFL requirements if they are subject to a collective bargaining agreement (CBA) that provides benefits and protections at least as favorable as those provided under the NY PFL law.

What are the employee notice requirements?

Employees must provide employers no fewer than 30 days' notice if they foresee the need for the leave. If the need for the leave is not foreseeable, the employee must provide notice as soon as practicable. An employee seeking intermittent leave is required to submit a schedule for the leave, and benefits may be withheld until such schedule is submitted. Moreover, the employee must submit a request for the leave and certification within 30 days of taking the leave to be eligible for benefits under the NY PFL law.

If notice for foreseeable leave is not provided 30 days in advance, the leave may be denied for up to 30 days after the notice is provided.

Does an employee have to mention the NY PFL law when providing notice to the employer?

The WCB regulations provide that the content of the notice to the Company must include:

- Sufficient information to make the Company aware of the qualifying event and the anticipated timing and duration of the leave
- The type of family leave (i.e., bonding, care for family member, or military exigency)

The regulations also provide that when an employee seeks leave for the first time for a qualifying event, an employee need not expressly assert rights under the NY PFL law or even mention family leave.

Can employees file advance requests for foreseeable qualifying events?

Yes. Under the WCB regulations, employees may file a request for NY PFL in advance of a foreseeable qualifying event (Advance Request). If such an Advance Request is filed, the carrier (or self-insured employer) must, within five days of receipt, provide the employee with notice that the claim has been received and a list of required missing information and instructions on how to submit

the missing information. Once the carrier (or self-insured employer) receives a completed request, it must provide the employee with a confirmation of receipt of a completed claim within three business days. And, if the completed request is received more than 18 days before a qualifying event occurs, the carrier (or self-insured employer) must send payment to the employee within five days following the qualifying event.

Are there required NY PFL request and certification forms?

Yes. The following is a summary of the forms:



NY PFL Request Form (PFL-1)

The Request form has both an employer and an employee section. Employees are required to complete their section and then provide the form to their employer. The employer must complete the employer section of the Request form and return it to the employee within three business days. The employee is then required to submit the completed form to the carrier along with the required certifications and/or proof of claim documentation.



NY PFL Bonding Certification (PFL-2)

Employees who are seeking NY PFL to bond with a new child must complete PFL-2 and also submit certain documentation to demonstrate the relationship of the child to the employee and the date of birth, adoption, or placement.



NY PFL Release of Medical Information (PFL-3) and Health Care Provider Certification (PFL-4)

Employees who are seeking NY PFL to care for a family member with a serious medical condition must submit a form signed by the family member who is the care recipient authorizing release of medical information as well as a completed health care provider certification form from the care recipient's health care provider.



NY PFL Military Qualifying Event Certification form (PFL-5)

Employees seeking leave for a military exigency must submit a certification demonstrating the qualifying reason for the leave and must also submit documentation demonstrating that the covered family member has been called to active duty and documentation demonstrating the reason for the requested leave.

What is required from an employee to file a claim?

Employees will be required to submit a request for NY PFL containing information prescribed by the State of New York. Employees will also be required to submit a certification (again in a format being prepared by the State of New York) to support the need for the leave.

- For bonding leave, employees will need to provide verification of the date of the child's birth, adoption, or placement.
- For leave to care for a family member with a serious health condition, employees will be required to submit a medical certification from the family member's health care provider.
- For military exigency leave, an employee will need to submit a copy of the family member's military documentation and possibly other documentation relating to the specific reason for the leave.

When can an employee expect payment on an approved claim?

The WCB regulations provide that carriers (or the employer if self-insured) must pay or deny claims within 18 days of filing a complete claim for benefits. If the NY PFL claim is not complete when it is filed, the carrier (or self-insured employer) must advise the employee in writing within five days of the information that is incomplete or missing and provide information on how to properly complete the claim.

Are employees entitled to continued health insurance during NY PFL?

Yes. The NY PFL law adopts the requirements of the FMLA with regard to continuation of health insurance while on NY PFL. Therefore, employers must continue health insurance benefits while an employee is on NY PFL. Employees must pay their portion of the health insurance premium and employers may terminate coverage if an employee fails to do so.

What are employer notice obligations?

Employers must provide employees with notice of their rights under the NY PFL law. Employers must update their handbooks and post an appropriate notice of employee rights in a conspicuous place. The NY PFL law also requires employers without written handbooks to provide employees with written notice of their rights.

Are there obligations to communicate in languages other than English?

Yes, carriers and self-insured employers are required to make reasonable efforts to communicate with employees in their preferred language. In that regard, the NY PFL request form prepared by the WCB will request employees to identify their preferred language. The WCB has translated many forms and they are available here: <https://paidfamilyleave.ny.gov/forms>.

Do employees on NY PFL have job protection?

Yes. The job protection provisions of the NY PFL law are similar to those of the FMLA. NY PFL leave is job protected, meaning that upon returning from NY PFL, an employee is entitled to reinstatement to his/her prior job position or to a comparable position with comparable pay, benefits, and other terms and conditions of employment. In addition, an employee may not be disciplined or retaliated against for requesting NY PFL or for absences that are covered under the NY PFL law.

Are NY PFL benefits taxable?

Yes. The NY Department of Taxation and Finance (NY DTF) has issued guidance indicating that it has conferred with the Internal Revenue Service and concluded the following:

- NY PFL benefits are taxable non-wage income that must be included in an employee's federal gross income.
- Taxes will not be automatically withheld from benefits by carriers (or employer self-insurers).

- Employees should be given the option by carriers (or employer self-insurers) of having taxes voluntarily withheld.
- Premiums for NY PFL should be deducted by employers from employees' after-tax wages.
- Employers should report employee contributions on Form W-2 using Box 14—state disability insurance taxes withheld.
- Benefits should be reported by the State Insurance Fund on Form 1099-G and by all other payers on Form 1099-MISC.

The NY DTF guidance addresses only federal income taxation. However, because NY is a so-called conforming state, NY state taxes will be treated the same way as federal income taxes.

How are disputes (claims appeals) about NY PFL claims resolved?

Under the NY PFL law, any disputes relating to NY PFL claims are required to be arbitrated in accordance with procedures established by the WCB. Requests for arbitration must be submitted within 26 weeks of the denial of the Request for NY PFL.

Employer compliance requirements

Listed below are a number of compliance requirements for employers to consider:



Payroll

Ensure that your payroll function is prepared to begin taking the updated employee deduction for the next year.



Waiver for certain temporary/part-time employees

You also must give employees who are not scheduled or expected to work 26 consecutive weeks or 175 days in a 52-week period with the option of signing a waiver of coverage for NY PFL benefits. The WCB has prepared a form of this waiver and it is available here: <http://www.wcb.ny.gov/content/main/forms/PFLWaiver.pdf>.



Update employee handbook

Update your employee handbook to address the rights and benefits under the NY PFL law. If you do not have an employee handbook, you must prepare a separate written communication for employees about the benefits and requirements of the NY PFL law.



Post required notice

Be prepared to post the required notice for employees summarizing rights and responsibilities under the NY PFL Law. The notice is being prepared by the WCB, and we will update you when it is released.

For Sun Life/NY Disability Benefits Law clients

Please contact your Sun Life Client Relationship Executive or Employee Benefits Representative for information about your policy and for sample tools that can help you communicate the changes.



Please visit us at www.sunlife.com/nypfl for more information.

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