

NEW YORK PAID FAMILY LEAVE LAW

FMLA, PTO and the New York Paid Family Leave Law

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This whitepaper is not intended to provide and should not be interpreted as legal advice. We recommend that you consult labor and employment counsel.

We have prepared this whitepaper to address employers' questions about the interplay between New York's Paid Family Leave law (NY PFL) and

- the Family and Medical Leave Act (FMLA)
- Employee use of employer-sponsored Paid Time Off and paid leave policies, and
- Employer reimbursement rights.

Many employers have expressed concern about whether or not employees can "stack" their FMLA leaves and/or employer-sponsored PTO and leave policies with leave under the NY PFL. Sun Life has been hosting regular informal calls with other NY PFL carriers and has invited the Worker's Compensation Board (WCB) to join calls to provide guidance on key issues. During those calls, the WCB has provided the guidance discussed in this whitepaper.

Requiring employees to use PTO during NY PFL

When FMLA is running concurrently. Under the NY PFL Regulations, employers are not permitted to require an employee to use PTO instead of (or concurrently with) NY PFL. However, the regulations permit an employer to require FMLA-eligible employees to run their FMLA concurrently with NY PFL (so long as the employer advises the employee of this requirement in advance). Many employer FMLA policies contain provisions requiring that PTO be used concurrently with unpaid FMLA leave. The WCB has said, in essence, that in such a circumstance, the FMLA “trumps” the NY PFL. Therefore, employers will be allowed to require employees to use PTO concurrently with NY PFL.

When there is no concurrent FMLA. The WCB has stated that if an employee is not eligible for FMLA during the period of the NY PFL leave (and/or has not been advised that such FMLA leave is running concurrently with the NY PFL), employers may not require employees to use what it described as “Vested PTO” during the period of the NY PFL.

Vested PTO versus Voluntary Pay

It is important to point out that the WCB has distinguished employers’ rights depending on whether the PTO is “Vested” or merely “Voluntary” employer pay (as well as whether or not the leave is running concurrently with FMLA). Vested PTO includes, for example, accrued but unused PTO/vacation that an employee would be eligible to be paid upon termination of employment. Voluntary pay includes, for example, an employer’s voluntary Paid Parental or Family Leave policy. This distinction between Vested and Voluntary PTO derives from case law interpreting NY Disability Benefits Law.

With regard to Voluntary Pay, the WCB indicated that employers have more rights to require concurrent use of Voluntary pay with NY PFL (regardless of FMLA eligibility), and that the scope of those rights should be set forth in the employer’s Voluntary Pay policy. Therefore, the employer could draft the Voluntary Pay policy to require employees to use the Voluntary pay concurrently with the NY PFL. Employers have two options:

1. **Full pay and reimbursement.** Employers could draft the Voluntary Pay policies to pay the employee full pay and then the employer could seek reimbursement. The employer would need to draft the Voluntary Pay policy to require the employee to file an NY PFL request in order to be eligible for the employer’s Voluntary Pay policy because the regulations permit employer reimbursement only if the employer makes a request for reimbursement in the NY PFL request, which can be filed only by the employee. The WCB specifically said that there is nothing in the regulations or statute that permits an employer to file a request for NY PFL on the employee’s behalf.

2. **Topping up of Pay.** Employers could draft the Voluntary Pay policy to provide that if an employee is eligible for NY PFL, the Employer will only pay the amount that would “top up” the employee to full pay (i.e., the difference between full pay and the employee’s NY PFL benefit). The burden would then be on the employee to file a request for NY PFL for that benefit.

Requiring “full day” use of PTO. One way employers may be able to ensure that employees exhaust their PTO (and do not “stack” it to run after NY PFL) is to include a provision in an employer policy that requires employees to use PTO in full day increments during a period of NY PFL leave. If the leave is FMLA protected, the employer could actually require the employee to use full day PTO during the period of NY PFL. If the leave is not FMLA protected, the employer could give employees the option to supplement their NY PFL benefits with PTO, but only in full day increments.

Employer Reimbursement from Carrier

The WCB has said the following about employer reimbursement:

- Employers are eligible for reimbursement only if the employer asks for reimbursement in the employer section of the PFL-1 request.
- Employers are not eligible for reimbursement if the employee is forced to use Vested PTO during a concurrent FMLA period. Many carriers disagree with the WCB’s position on this issue and believe that an employer is entitled to be reimbursed if it pays the employee PTO in an amount that exceeds the NY PFL benefit, regardless of whether the use is “forced” or “voluntary.”
- Employers are not eligible for reimbursement if an employee is paid from an insured fund, such as fully insured STD. However, if the employee is paid full pay as part of an employer’s uninsured Salary Continuation payroll practice, the employer would be eligible for reimbursement.

Conclusion and caution

It is possible that the WCB’s interpretations of these issues may evolve. It is also possible that the courts may interpret the NY PFL differently from the WCB. The following pages provide samples of Employer Policy provisions. Employers should obtain their own legal advice from labor and employment counsel.



Samples of Employer Policy provisions

Please note that these are samples. You should consult labor and employment counsel in drafting your policies.

1. FMLA Policy

Pay during leave

Family/Medical Leave generally is unpaid leave. However, any accrued available and applicable paid leave, including but not limited to [list employer pay programs], must be used during unpaid Family/Medical Leave to the extent permitted by law. In addition, you may be eligible for state disability or workers' compensation benefits and/or state paid family leave benefits during all or part of the 12-week leave period when the leave is requested. The receipt of any such benefits or the substitution of paid leave for unpaid leave time does not extend the 12-week Family/Medical Leave period.

NY PFL, FMLA & Accrued PTO

Option #1: If you are eligible for both NY PFL and FMLA leave, and if you have accrued but unused vacation or Paid Time Off, you will be required to use such accrued but unused PTO to "top up" the amount of your NY PFL benefit during such concurrent NY PFL and FMLA leave.

Option #2: If you are eligible for both NY PFL and FMLA leave, and if you have accrued but unused vacation or Paid Time Off, you will be required to use your PTO in full day increments during the period of the concurrent NY PFL and FMLA leave. You will be paid your full pay by the Company (to the extent that PTO is available), and the Company will request reimbursement of your NY PFL benefit from the insurance carrier. You will also be required to submit a request for NY PFL to demonstrate eligibility.

2. NY PFL Policy

FMLA runs concurrently with NY PFL

If you request NY PFL and you are also eligible for leave under the Family and Medical Leave Act (FMLA) during the same period of time, your leave will also be designated as FMLA leave and will run concurrently with leave under the NY PFL.

Option #1: If your period of NY PFL is also eligible for FMLA leave, you must use your accrued PTO during the leave to "top up" the amount of your NY PFL benefit to full pay.

Option #2: If your period of NY PFL is also eligible for FMLA leave, you will be required to use your accrued PTO in full day increments. You will be paid your full pay by the Company (to the extent that PTO is available), and the Company will request reimbursement of your NY PFL benefit from the insurance carrier. You will also be required to submit a request for NY PFL to demonstrate eligibility.

Use of PTO during NY PFL (no FMLA eligibility)

Option #1: If your period of leave is not eligible for FMLA protection, you may use accrued PTO to top up your NY PFL benefit to full pay.

Option #2: If your period of leave is not eligible for FMLA protection, you may use your accrued PTO to supplement your NY PFL benefit but you must use PTO in full day increments. If you choose to use PTO, you will be paid your full pay by the Company (to the extent PTO is available) and the Company will request reimbursement of your NY PFL benefit from the insurance carrier. You will be required to submit a request for NY PFL to demonstrate eligibility.

3. Company's Paid Parental Leave [or Paid Family Leave] Policy ("Paid Leave Policy")

Option #1: To be eligible to receive benefits and leave under the Company's Paid Leave Policy, if you are also eligible for NY PFL, you must file a request for NY PFL benefits. The Company will pay your full salary during the period of the NY PFL leave, and the Company's Paid Leave will run concurrently. The Company will be entitled to be reimbursed by our insurance carrier for the amount of your NY PFL benefit during this period of leave.

Option #2: If you are eligible for benefits and leave under the Company's Paid Leave Policy, your leave under the Paid Leave Policy will run concurrently with your NY PFL if you are also eligible for NY PFL (regardless of whether or not you choose to file a request for NY PFL). The amount of your paid benefit under the Company's Paid Leave Policy will be the difference between your pro rata salary and your pro rata NY PFL benefit for the period of the leave. You are responsible for submitting a request for NY PFL to receive the NY PFL benefit.



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GDIWP-7301-e

SLPC 28830 10/20 (exp. 10/21)