

IBI Conference

Legal Considerations for New York Paid Family Leave

Presented by:

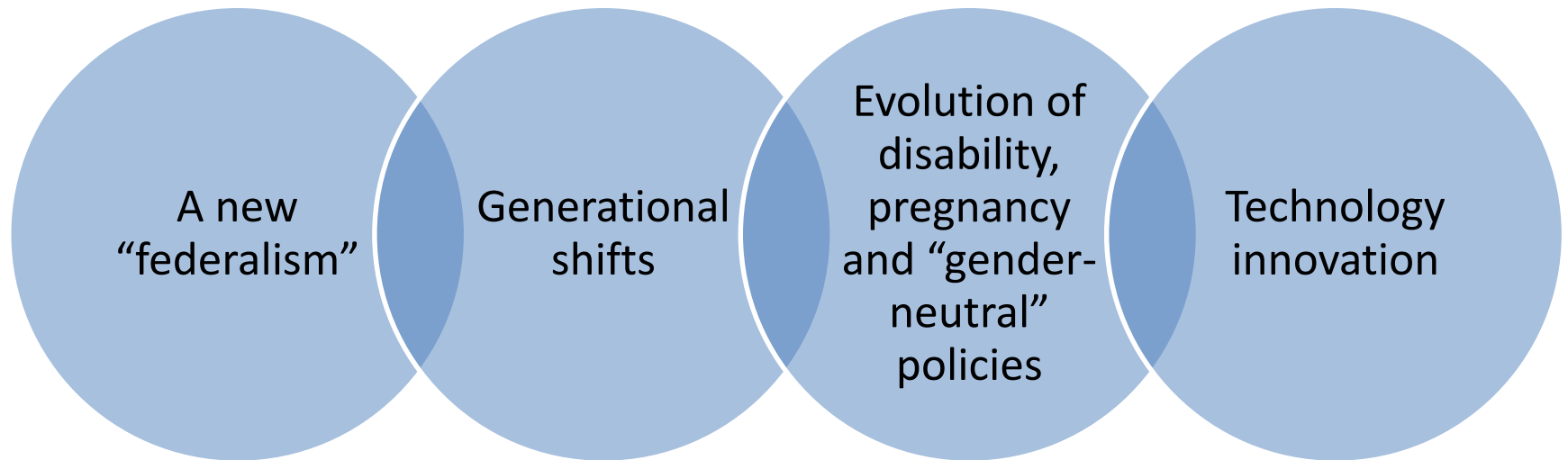
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A Moment in Time?



Paid Family Leave – The Next “Bigger” Thing?

- ◆ Like Paid Sick Leave, the wave is starting to build
- ◆ Like Paid Sick Leave, there are a patchwork of protections
- ◆ Unlike Paid Sick Leave, the entitlement is much longer
- ◆ Unlike Paid Sick Leave, it requires extensive FMLA coordination and, in the case of NY, collaboration with insurers
- ◆ Largely grounded in gender equality and pay equity
- ◆ Like most leave laws, often politically popular
- ◆ Many are funded through payroll deductions, creating low levels of political resistance and a “no big deal” attitude

The Paid Family Leave Landscape

Status of Paid Family Leave	States
Already In Effect	CA, NJ, RI, SF
Enacted – Not Yet Effective	NY, WA, DC
Currently Pending (or carried over to 2018)	Fed??, DE, DC, GA, IL, IN, ME, MA, MN, NE, NH, OK, PA, VT



*Lessons We Are Learning &
Questions Being Asked*

THIS STUFF IS COMPLICATED

Lesson #1

NYPFL – Blindsided By Complexity

- ◆ Much more than a paid leave law
- ◆ Combining job-protected leave with pay is a game changer
- ◆ Severing delivery system for benefits is a game changer
 - Insurer delivers pay
 - Employer provides job protection
 - Employer provides benefit continuation
- ◆ Many detailed and unanswered questions ... with little or no effective means to obtain answers
- ◆ Insurers and employers are left to “do their best”
- ◆ We are all learning together

Integration Scenarios

- ◆ Scenario 1: Absence is covered by NYPFL only
 - Straightforward – will be administered primarily by insurance carrier
- ◆ Scenario 2: NYPFL overlaps with FMLA
 - More complex – must coordinate decisions between PFL insurance carrier and internal or external FMLA and benefits administrator
- ◆ Scenario 3: NYPFL overlaps with FMLA and accrued paid time or voluntary family leave policies
 - Most complex – must coordinate decisions between PFL insurance carrier, internal or external FMLA administrator, group health benefits administrator, and HR personnel responsible for administering paid time and family leave policies

TOO MUCH, TOO QUICKLY

Lesson #2

NYPFL Timeline

- ◆ April 2016: NYPFL becomes law as part of a budget bill
- ◆ February 22, 2017: Proposed Regulations issued
- ◆ May 24, 2017: Revised Proposed Regulations issued
- ◆ June 23, 2017: 30 Day Comment Period closed
 - WCB received 58 comments
- ◆ July 1, 2017: Payroll deductions may begin
- ◆ July 10, 2017: Final Regulations adopted
- ◆ September 30, 2017: Self-insurance application deadline
- ◆ January 1, 2018: NYPFL becomes effective

PAYROLL DEDUCTION QUESTIONS

Questions Around Payroll Deductions

◆ How much?

- The maximum employee contribution for coverage beginning on 1/1/2018 is 0.126% of an employee's weekly wage, up to and not to exceed the statewide average weekly wage (AWW).
- $AWW = \$1305.92$
- Does that mean the maximum employee contribution is \$1.65/week for 2018? ($\$1,305.92 \times .00126$)
- **Apparently “no,” payroll deduction cap is annualized**
 - **\$67,907.84 is annualized AWW**
 - **\$85.56 is 0.126% of \$67,907.84**
- Therefore, our recommended approach is to deduct 0.126% from weekly wages, even if above AWW, until you hit annual cap of \$85.56

Questions About Payroll Deductions

◆ How soon?

- Many employers think you only deduct from employees who are covered employees
 - Must work 26 consecutive weeks or 175 days depending on work schedule
- Not so ... absent an employee executing a waiver opting out from NYPF coverage, employer makes payroll deductions from first day of employment
- So employees must pay even before they become eligible
- Creates a bit of an employee relations discomfort

Questions About Payroll Deductions

- ◆ Are they even required?
 - The law requires coverage, not deductions
 - Employers can choose to bear all the costs if they wish
 - But if employers make deductions, they must be in accordance with the regulatory limits
- ◆ Unionized operations pose additional concerns
 - Deductions may be mandatory subjects of bargaining
 - Must give notice to unions
 - Little push back to date
 - Does management waive rights if it does not take deductions

Questions About Payroll Deductions

- ◆ What does an employer do if its payroll company is not capable of making the deductions?
- ◆ Must employer obtain employee's permission to make the deductions?
- ◆ Must employer obtain the state's permission to make the deductions?
- ◆ Are deductions made from pre or post tax earnings?
 - NYS Department of Taxation statement says post-tax
 - What's the IRS's position?



WEEKLY BENEFIT CALCULATIONS

Questions About NYPFL Benefit Calculation

- ◆ 50% of AWW
- ◆ AWW is computed over the 8 weeks immediately preceding NYPFL
- ◆ What if employees have lower or higher than normal earnings in 8 weeks immediately before NYPFL?
- ◆ What if employees have no earnings in 8 weeks immediately before NYPFL?
 - Does it matter if the period before NYPFL was WC, LTD, STD, Pregnancy-Related Disability covered by DBL/STD?



USE OF ACCRUALS

Uncertainty Around Use of “Accruals”

- ◆ What the NYPFL law says?
 - NYWC Law §206(3): “No family leave benefits shall be payable under section two hundred four of this article ... (c) to an employee during periods where the employee is collecting sick pay **or paid time off** from the employer.”
 - NYWC Law §206(4): “Unless expressly permitted by the employer, benefits available under [FMLA] must be used concurrently with family leave benefits.”

Uncertainty Around Use of “Accruals”

◆ What the NYPFL regulations say? **§380-6.2**

- “In the event an employer offers, and the eligible employee exercises, an option to charge all or part of his or her family leave time to unused accruals **or other paid time off** and receive full salary, the employer may request reimbursement out of any family leave benefits due or to become due by filing its claim for reimbursement with the carrier prior to the carrier's payment of such family leave benefits. The actual reimbursement amount may be computed after family leave is complete.”
- With the election of this option, the employee shall receive the full protection of the reinstatement provision set forth in section 203-b of the Workers' Compensation Law.
- An employer covered by the FMLA (29 U.S. Code Chapter 28) that designates a concurrent period of family leave under section 380-2.5(g) of this Part may charge an employee's accrued paid time off **in accordance with the provisions of the FMLA.**
- In no event can an employee utilize family leave beyond 12 weeks, or the maximum duration permitted as set forth in paragraph (a) of subdivision two of section 204, per any consecutive 52-week period.

◆ What the NYPFL regulations say? **§380-2.5(g) (3)**

- If an employer designates a period of family leave to be covered by the FMLA for a reason also covered under section 201(15) of the Workers' Compensation Law, and if the employer informs the employee of their eligibility for family leave benefits and the employee declines to apply for payment under section 380-5.1 of this Part, the employer and its insurance carrier may count the leave against the employee's maximum duration of family leave in a 52 week period under section 204(2)(a).

So What Counts As An “Accrual”?

- ◆ Paid Time Off (PTO)?
- ◆ Company Provided Paid Family Leave?
- ◆ Company Voluntarily-Provided Paid Parental Leave?
- ◆ Company Voluntarily-Provided STD (not DBL) for disability occasioned by childbirth?

PTO & Paid Family Leave Policies

- ◆ Can you run them concurrently with NYPFL?
- ◆ FMLA generally can be run concurrently with any voluntary company leave policies, whether paid or unpaid
- ◆ Not so clear under NYPFL
- ◆ Lumps accrued pay time (e.g., PTO) together with other types of paid leave (e.g., family leave)
- ◆ Cannot force employees to use such accruals – makes sense for PTO (i.e., like FMLA) but not paid leave policies, as it would require “stacking” of company paid leave on top of statutory NYPFL

A blurred office scene with a blue overlay. The background shows office desks, chairs, and windows, but they are out of focus. The text is centered in white, bold, uppercase letters.

CALCULATING NYPFL USAGE FOR EMPLOYEES WORKING VARIABLE WORK SCHEDULES

Do You Calculate NYPFL using Daily Leave or Weekly Leave?

◆ Example:

- EE works variable work schedule. During the 8 weeks immediately preceding leave, EE worked an average of 5 days a week but it fluctuated from 3 to 6 days a week. AWW is \$500.
- Employee takes NYPFL over 9 weeks;
 - Week 1: Starts on Wednesday and calls out for NYPFL on Wednesday, Thursday, Friday and Saturday.
 - Week 2 – 8: Calls out full work week but only scheduled on average 4 days a week.
 - Week 9: Calls out seeing NYPFL on Sunday, Monday and Tuesday.
- ◆ How much does EE receive in pay during Week 1, Weeks 2 to 8, and Week 9?

ADMINISTERING PARTIAL DAY ABSENCES

Partial Day Absences

- ◆ They do not count as NYPFL
- ◆ They can count under federal FMLA
- ◆ This increases total “collective” amount of paid family leave because NYPFL and FMLA would not run concurrently
- ◆ Scenario 1: FMLA not available:
 - May require use of accrued paid time because it is not FMLA.
Can force usage of accrued paid time because it is not NYPFL.
- ◆ Scenario 2: FMLA is available
 - Cannot force use of accrued paid time because it is paid leave.
Can offer EE opportunity to supplement FMLA time with PTO



WILL NYPFL BE FUNDED COMPLETELY THROUGH PAYROLL DEDUCTIONS?

You Do the Math

- ◆ Maximum annualized payroll deduction for 2018 is \$85.56
- ◆ AWW is \$1305.92
- ◆ 50% of AWW is \$652.96
- ◆ 8 weeks of AWW is \$5,223.63
- ◆ $\$5,223.63 / \$85.56 = 61.05$
- ◆ Therefore, it will take deductions from 61 employees to pay for 8 weeks of NYPFL benefits for 1 employee
- ◆ Underfunded?
- ◆ If so, who pays for the benefit?

Self-Insurance Surprises

- ◆ If you insure NY statutory disability, your disability carrier must offer you NYPFL coverage
- ◆ If you self-insure NY statutory disability, the law technically permits you to insure NYPFL ... but try to find a carrier who will offer it
- ◆ Therefore, if you self-insure DBL, you must either:
 - Self insure NYPFL; or
 - Start insuring both DBL and PFL as of 1/1/2018

Self-Insurance Exposures

- ◆ Final NYPFL regulations require self insurers to sign an agreement confirming that they will pay for all benefits, even if the benefits exceed amount received through employee payroll deductions
- ◆ Self-insurance at odds with pooled risk and community rating insurance concepts which drive NYPFL statutory design
- ◆ Payroll deductions unlikely to cover benefits
- ◆ What if female employees choose to take PFL instead of DBL

OTHER NYPFL “SURPRISES”

Say What?

- ◆ NYFPPF covers more family members than FMLA
 - Grandchildren, Grandparents, Domestic Partners, Parent-In-Laws
 - This means employees may end up receiving more than 8 or 12 weeks of family leave each year
- ◆ Must arbitrate claim-related disputes
 - Is this just pay or denial of job restoration or health insurance?
 - What are remedies for mistakes in payroll deductions?
 - How does Section 120 discrimination/retaliation claims shape the remedies at arbitration?
 - Do Section 120 claims require proof of “intent” or will it be like FMLA “interference” concept?

Other Questions?

- ◆ Must insurers require documentation and certification establishing rights to NYPFL?
- ◆ May an employer unilaterally designate NYPFL, especially if the leave is simultaneously covered by FMLA?
 - If not, then employer must accept more job-protected family leave, and potentially lose right to seek reimbursement for use of accrued paid time benefits
- ◆ Are employees with occasional presence in NY covered?
 - Can they claim protections?
 - Must employer make payroll deductions?

