Thursday, May 5, 2016 / Volume 108 / Number 87

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & Tribulations

NY passes most extensive Paid Family Leave policy in US

By LAURA MYERS
Daily Record Columnist

On April 4, 2016, Governor Andrew Cuomo signed the New York State 2016-2017 budget, which contained the most extensive paid family leave legislation that has been passed in the United States to date. The federal Family Medical Leave Act (FMLA), enacted in 1993, requires covered employers to provide protected, unpaid leave to eligible employees for specific family or medical reasons.

In contrast, New York's Paid Family Leave Benefits Law implements an insurance-based model, and provides paid leave for eligible full and part-time employees, funded by payroll deductions. In addition, virtually all private employers must administer the benefit. This leave is protected; employers cannot terminate or fail to reinstate employees who take leave under the law.

New York's Paid Family Leave (PFL) law is in essence an insurance policy that will ultimately cover up to 12 weeks of leave when an employee is caring for family a member. Specifically, where an employee has worked for an employer for at least six months, the law covers that employee's time off when caring for a new born, adopted or foster child within the first 12 months of birth or placement; caring for a family member with a serious health condition, including a spouse, domestic partner, child, parent, grandparent, grandchild, sibling, or parent of a spouse or domestic partner; or fulfilling a family obligation where a family member, including a spouse, domestic partner, child or parent, is called to active military service.

The PFL law becomes effective Jan. 1, 2018, and will be fully implemented on Jan. 1, 2021. Initially, full and part-time workers can receive 50% of their average weekly wage, capped at 50% of the statewide average weekly wage (currently approximately $648), for up to eight weeks. The program will be implemented in annual phases, and when fully implemented in 2021, will cover 67% of an employee's average weekly wage, capped at the statewide average weekly wage (currently approximately $868) for up to twelve weeks.

The payments provided to employees will be funded solely by a weekly employee payroll deduction, which will be approximately $1 per employee. Under this payment scheme, employers are not directly required to make any financial contribution to cover employees' paid leave benefits. However, employers will have to bear the costs associated with administering the payroll deduction and obtaining insurance for the benefit under the new law.

Employers will also be responsible for implementing changes to internal policies and covering the costs of employee absences during the paid leave period. Unlike the FMLA, there are no exemptions for small businesses. This policy will extend to all employers who are covered under the Disability Benefits Law, and will include sole proprietors, members of an LLC or LLP, or other self-employed persons with employees.

The PFL law amends Article 9 of the Workers Compensation Law, and is implemented through amendments to Disability Benefits Law §200 - §242. Section 203-a prohibits retaliatory action against an employee for taking Paid Family Leave. Specifically, the law prohibits an employer from discharging or failing to reinstate an employee.

"The program will be implemented in annual phases, and when fully implemented in 2021, will cover 67% of an employee's average weekly wage, capped at the statewide average weekly wage (currently approximately $868) for up to twelve weeks."

An employer is required to reinstate an employee who has taken leave to the same or a comparable position, with comparable terms of employment, pay and benefits. The law also ensures that employees will not suffer the loss of a current employment benefit for taking leave, such as health insurance. Employees also maintain all other benefits provided by the FMLA pursuant to 29 U.S.C. §2601 through §2654. Leave benefits will be managed as a part of the temporary disability insurance program that has been in place in New York since 1950.

The law also provides the employer with the power to implement a number of internal policies, to offset any negative impact on the business. Specifically, employers may implement a policy requiring eligible employees to take paid family leave concurrently with any leave they are entitled to pursuant to the FMLA. Employers may

Continued on next page

Continued from previous page

also provide employees with the option of receiving their full pay by using all unused vacation or personal days for the care of their family member.

As with disability insurance, if the employee elects to receive their full pay for that time period, the employer is entitled to reimbursement from its insurance carrier in the amount of the family leave benefits that would be due to the employee.

The Chair for the Workers' Compensation Board has the authority to create and implement regulations to enforce each of the provisions of the PFL law. Specifically, the Chair has been charged with developing regulations to govern an employer's rejection of an employee's claim for Paid Family Leave and other issues that may arise.

The family member upon whom the employee's leave request is based may be subject to a physical examination to confirm their health condition. Regulations will be necessary to govern the process for such examinations.

Other regulations to be implemented will include an employer's obligation to provide employees with notice of their right to Paid Family Leave and an employee's obligation to provide their employer with timely notice of their intent to use Paid Family Leave.

The regulations will also create a designated process for reviewing Paid Family Leave claims that have been contested by employers. The legislation requires the creation of a process that affords the employer and employee with the opportunity to present evidence and be represented by counsel.

The regulations will also dictate who will bear the cost of resolving disputed claims and will set forth fines or penalties where a party fails to comply with the law. The Chair can also create regulations establishing an alternative dispute resolution system for disputed claims, which will be governed by CPLR §75.

While New York's PFL law is currently the most expansive policy of its kind in the United States, California, New Jersey, Rhode Island, and Washington have passed similar paid family leave legislation. Washington's legislation has not yet been implemented. The first program of its kind was implemented in California in 2004. Under the California's law, 55% of an employee's wages are covered for up to six weeks. As of the end of 2014, 1.7 million claims had been filed under this program.

New Jersey was the next state to pass a paid family leave policy, or the NJPFLA, in 2009. The NJPFLA covers up to 67% of wages for six weeks, with a maximum weekly benefit of $595. In 2014, Rhode Island implemented its paid family leave program. The Rhode Island program covers a portion of wages for up to four weeks, based upon the employee's income.

While studies performed since the implementation of these states' policies have not shown a significant increase in litigation resulting from disputed claims, there is no question that employers must be prepared to implement the law prior to the Jan. 1, 2018 deadline.

Once regulations have been promulgated, employers will need to update and review their current insurance coverage, as well as their employee handbooks and policies to ensure that the law's requirements and regulations are met.

Laura Myers is an associate at the Wolford Law Firm LLP, where she practices in the areas of business, commercial and employment litigation.