

New York Paid Family Leave Law

New York state recently enacted the strongest paid family leave law in the United States, which will take effect January 1, 2018. Four other states (California, New Jersey, Rhode Island and Washington) have paid family leave laws, but none provide as much leave as New York's will. Although the federal Family and Medical Leave Act has long guaranteed family leave to certain employees (see chart below), that leave is *unpaid*. As discussed more fully in this alert, New York's law provides for *paid* leave. All employers covered by the New York State Workers Compensation Law must comply with the New York Paid Family Leave Law.

How The Law Works

Beginning in January 2018, eligible employees in New York will be entitled to take paid family leave for any of the following reasons:

- To participate in providing care, including physical or psychological care, for a family member with a serious health condition.
- Family member means a child, parent (including an adoptive parent, stepparent or parent-in-law), grandparent, grandchild, spouse or domestic partner.
- Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice or residential health care facility, continuing treatment or continuing supervision by a health care provider.
- Continuing supervision by a health care provider includes a period of permanent or long-term incapacity due to a condition for which treatment may not be effective where the family member is under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

To bond with the employee's child during the first 12 months after the child's birth, or the first 12 months after the placement of the child for adoption or foster care

with the employee. All new parents are eligible, and two-parent couples may stagger their leaves, with one parent taking 12 weeks and then the other parent taking 12 weeks.

Because of any qualifying exigency arising out of the fact that the spouse, domestic partner, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the U.S. armed forces.

Employees must provide their employers 30 days' advance notice of their intent to take paid family leave if the need for such leave is foreseeable and must provide certification of the need for leave. Paid family leave may be taken on an intermittent basis (i.e. a day or two at a time).

Virtually all private employers will be covered by the law regardless of the number of employees. Employees who regularly work 20 hours per week will be eligible for paid family leave after they have worked at least 26 consecutive weeks (six months) for their employers, while part-time employees must work 175 days. (Employees who are not expected to reach the 175-day threshold are permitted – but not required – to opt out of making payroll contributions and receiving paid family leave benefits.)

Under the new law, an employer may allow an eligible employee to *choose* to substitute accrued vacation or other paid time off (at full salary) for paid family leave (at less than full salary). The law, however, does not allow an employer to *require* that an employee use accrued paid time off instead of receiving paid family leave benefits. Where an employee chooses to use paid time off, the employer can request reimbursement from its insurance carrier for the paid family leave benefits to which the employee would have been entitled.

The new law also provides for job protection while on leave. An employee who takes paid family leave is entitled to be restored to the same or comparable position when he or she returns from leave. Employers must also maintain employees' existing healthcare benefits during the leave period. Indeed, it is unlawful for an employer to discriminate or retaliate in any way against employees who choose to take paid family leave.

Employers must post notices in the workplace detailing their employees' right to take paid family leave. A sample notice is available from an employer's disability insurance carrier or the Workers' Compensation Board. Employers must also update their employee handbooks and similar materials to include a section on paid family leave. When employees have been absent from work for more than seven consecutive days for family leave reasons, employers must provide them with a written statement of their rights to paid family leave. (Presumably, the Workers' Compensation Board will make such forms available prior to January 1, 2018; forms may also be available from individual insurance carriers.)

Employers Can Finance Paid Leave Through Employee Payroll Deductions

The law does not require employers to pay employees directly for covered leaves; rather, the leave benefits will be administered by the Workers' Compensation Board as part of New York's short-term disability insurance law.

Employers may begin deducting contributions from employees' pay to finance this paid leave benefit. Unlike workers' compensation and disability insurance, however, employers will *not have to* contribute anything toward paid family leave benefits. Employers are instead permitted to *choose* to cover the cost of the paid family leave benefits themselves rather than making deductions. Employers electing to make deductions were permitted (but not required) to begin doing so in July 2017. The payroll deduction on employee wages is currently equal to 0.126 percent of an employee's weekly wages, up to a maximum of \$1.65 per week; this figure may change after 2018. Employers who would like to finance paid leave through payroll deductions should contact their payroll administrators.

Paid family leave insurance is available from the same carrier that provides an employer's state disability insurance. A New York employer who has not yet been contacted by its state disability carrier regarding paid family leave insurance should reach out to that carrier.

Gradual Phase-In

The paid leave benefits will be phased in gradually. In 2018, eligible employees will be entitled to a maximum of eight weeks of paid family leave, which will gradually increase until 2021, at which time they will be entitled to 12 weeks of paid leave. Like state disability insurance benefits, benefits are to be paid biweekly.

Initially, eligible employees on paid family leave will be entitled to 50 percent of their average weekly wage, or 50 percent of the statewide average weekly wage, whichever is lower. (Currently, this would mean a maximum payment of \$652.96 per week.) By 2021, the benefit will rise to the lower of 67 percent of an employee's average weekly wage, or 67 percent of the statewide average weekly wage.

The phase-in will work as follows:

Year	Weeks of Leave	Percentage of Weekly Wage
2018	8	50%
2019	10	55%
2020	10	60%
2021	12	67%

Comparison with FMLA

New York's new paid family leave law shares some differences and some similarities with the federal Family and Medical Leave Act, as shown in the following chart:

	Family and Medical Leave Act	Ny Paid Family Leave Law
Paid or unpaid	Unpaid	Paid
Weeks of leave	12	Initially 8, rising to 12 by 2021
Employers covered	Only employers with at least 50 employees	Any size employer
Months employees must work to be covered	12 months with 1,250 hours of service	6 consecutive months or 175 days for part-time employees
Covers employee's own serious health condition	Yes	No
Covers bonding with newborn/newly adopted child	Yes	Yes
Covers caring for family member with a serious health condition	Yes	Yes
Covers military exigency of family member	Yes	Yes
Can be used intermittently	Yes	Yes
Requires 30 days' notice if feasible	Yes	Yes
Requires medical or other certification	Yes	Yes
Employee must be restored to same/similar position	Yes	Yes
Health insurance must be maintained during leave	Yes	Yes
Employer can require employee to substitute paid time off	Yes	No
Prohibits retaliation	Yes	Yes

**FOR QUESTIONS RELATING TO THIS
CLIENT ALERT, PLEASE CONTACT:**

Randi B. May
212.689.8808
rmay@hnrklaw.com



ABOUT RANDI B. MAY

On behalf of employers, Ms. May's counseling experience includes advising a broad range of clients concerning all aspects of the employment relationship to avoid litigation. She advises employers about hiring and termination of employment, policies and practices, employee misconduct, restrictive covenants, leaves of absence and compliance with federal, New York state and New York City laws governing employment. Ms. May also regularly drafts, reviews and negotiates employment and executive compensation agreements, restrictive covenants and separation agreements.

**ABOUT HOGUET NEWMAN
REGAL & KENNEY, LLP**

Hoguet Newman Regal & Kenney, LLP is a litigation boutique founded by senior trial lawyers dedicated to using their decades of experience to represent clients faced with sophisticated and demanding legal issues effectively and responsively in a small firm setting.

This client alert represents only a general review of the subjects covered and does not constitute legal advice. No legal or business decisions should be made based on the contents of this client alert without obtaining specific legal advice based on particular situations.