

# New York State Paid Family Leave (NYPFL) Law

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## Covered Employers/Out-of-State Employees

### Who are “covered employers”, that is, what employers are required to provide NYPFL?

All private sector organizations with at least one employee (not counting the owner) on each of 30 days in any calendar year are covered employers under the NY PFL law. Public employers, meaning the state, any political subdivision of the state, a public authority or any other governmental agency or instrumentality are not “covered employers”.

Sole proprietors, Limited Liability Partnerships (LLPs), Limited Liability Companies (LLCs), and other self-employed persons (e.g. independent contractors) are considered “individual business owners” and not “covered employers” so long as they are entitled to keep all the profits after taxes, are liable for all losses, and have no employees. If these business owners have even one employee “employed” (working) in New York State, then the employer is a covered employer and must secure PFL coverage for that employee.

\*\*\*\*Each employer must determine if it is a “covered employer” under the NY Workers’ Compensation law (Article 9 WCL, §201; 12 NYCRR 355.4; see also OC-923 (9-16)). Guardian cannot make this assessment for employers, employers are advised to confer with legal counsel.

### Can public employers voluntarily provide PFL coverage? How do they opt in?

Public employers are not required to provide their employees DBL or PFL. A public employer may opt into the DBL, PFL, or both DBL/PFL program(s). Coverage must be maintained for at least one year and may only be canceled after providing 12 months’ notice to all affected unrepresented employees (non-union) and to the Workers’ Compensation Board.

Public employers would secure PFL coverage through one of three options:

- providing Paid Family Leave benefits through an existing disability benefits policy;
- obtaining a stand-alone Paid Family Leave insurance policy, or
- self-insuring for Paid Family Leave.

Public employers that offer DBL through an insurance policy may not self-insure for PFL (true for private employers too).

**For Union Employees.** Public employees represented by a labor union may be covered for NYPFL, if the benefit is collectively bargained with the public employer. The agreed-upon plan must then be submitted to the NY Workers’ Compensation Board for approval. The plan must be “at least as favorable” as the statutorily mandated NYPFL benefits and may not permit eligible employees to waive PFL coverage.

Once an agreement is reached, written notice must be provided to the WCB Chair, including a list of employees and coverage information. Opting out may occur later if agreed upon by the union and public employer. There’s no notice requirement to union employees, in contrast to 12-month discontinuation notice requirement to non-union public employees.

A collective bargaining agreement for NYPFL may provide rules that differ from the Paid Family Leave regulations.

Where the agreement does not provide a different rule, the Paid Family Leave regulations will apply. For example, the CBA may include rules regarding but not limited to the following:

- Employees are permitted to collectively establish their eligibility for PFL benefits through actual time worked at any employer covered by the CBA, so long as the time period for eligibility is not greater than required law.
- The union may be responsible for time records and payroll deductions related to the administration of the PFL.

**For Non-Union Employees.** A public employer may opt into NYPFL by submitting an application (PFL-135 if

taking employee deductions; PFL-136 if not taking employee deductions to pay the premium) and its plan (whether coverage will be through a private insurer or self-funded) to the NY Workers' Compensation Board (WCB), along with providing notice to its employees at least 90 days before collecting employee deductions. Coverage must be maintained for at least one year and may only be canceled after providing 12 months notice to all affected non-union employees and to the NY WCB.

#### **Public Employer Steps to Opt-In to NY PFL:**

- Email the NY Workers' Compensation Board Plan Acceptance Unit on or before December 1, 2017 at PAU@wcb.ny.gov stating that you plan to provide Paid Family Leave to employees in 2018. Submit appropriate employer application for voluntary coverage (PFL-135, PFL-136).
- Even if you choose not to opt in by December 1, you may do so at a later date.
- Notify your disability benefits insurance carrier (if you do not self-insure) of your decision.
- Notify your employees. Ordinarily the rules require 90 days notice to employees of deductions for voluntary DBL or PFL coverage, but it appears this length of notice is not possible for the inception of the PFL program, as notice to the WCB isn't due until 12/1/17. If you have employees that are represented by a union, the public employer should engage the employee union(s) to negotiate the terms of their participation.

**Note:** If you have specific questions regarding the December 1 notification deadline or other questions about opting in, please write to PFLinquiries@wcb.ny.gov. You can also contact the Paid Family Leave Helpline at 844 337 6303.

#### **Can a public employer opt in only for PFL?**

Yes, a public employer may elect only to provide PFL and not DBL. This is the one instance where the requirement that an insurer provide coverage offering both DBL and PFL wouldn't apply, and the insurer could offer PFL-only coverage. Guardian is not in a position to offer PFL only in 2018.

#### **Can public employers who voluntarily provide DBL opt out of providing PFL?**

Yes. The steps to opt Out of PFL are as follows:

- Email the Workers' Compensation Board on or before December 1, 2017 at PAU@wcb.ny.gov stating that you do not plan to provide Paid Family Leave to employees in 2018. Even if you choose not to opt in by December 1, you may choose to do so at a later date.
- Notify your disability benefits insurance carrier (if you do not self-insure) of your decision.
- Notify your employees, or if they are represented by a union, you should advise any union(s) representing your employees of this decision.

#### **What about private employers with some but not all of its employees in a union?**

To reiterate, all private sector organizations with at least one employee (not counting the owner) on each of 30 days in any calendar year are covered employers under the NY PFL law. The employer would need to cover its union and non-union employees for NYDBL and NYPFL.

#### **Are all non-profit organizations exempt from PFL?**

No, only if they are public employers. As private organizations, non-profit organizations are covered employers. There is, however, an important distinction between not-for-profits generally and not-for-profits that are religious, educational or charitable organizations. Certain types/classes of employees are excluded from NY's state-mandated DBL/PFL coverages for non-profit religious, education or charitable institutions, but they not excluded for non-profit 501(c)(3) organizations that are not religious, educational or charitable organization, nor does the employee class exclusion apply to religious or educational institutions that are for profit organizations, such as a college may be.

Employees in Non-Profit Organizations. Other than a non-profit with NO compensated individuals providing services; or the exceptions listed under Non-Profit Religious, Charitable And Educational Institutions, individuals working for a nonprofit organization are

covered for DBL/PFL the same as those working for a for profit business (see FAQs Employee Eligibility).

### **Are charter schools required to provide NYPFL?**

Although charter schools may be public schools, if the charter school is operated by a private for-profit company, this could potentially impact their status as a public employer.

### **Must out-of-state employers with employees working in New York provide NY PFL? How do you determine if an employee is considered a NY employee?**

Yes, an out-of-state employer needs to provide PFL coverage if the employer has in its employment one or more employees on each of at least thirty days in any calendar year that is employed in New York State. NY DBL and NY PFL are mandated benefits for employees who work in New York, technically whose "employment" is in New York. Each employer must determine if it is a covered employer under the NY Workers' Compensation law and regulations (WCL §201, 12 NYCRR 355.4) and if its employees meet the definition of "employment" under NY Workers Compensation Law (12 NYCRR 201(6)). Any employees that do not meet the definition are generally referred to as out-of-state employees and are not covered for PFL.

NY Workers Compensation Law §201(6)(B) and (C) (copied in below) of the WCL control when an employee is in employment and covered for NY DBL and NY PFL for the purpose of Article 9 of the WCL.

WCL §201 6 B. The term "employment" includes an employee's entire service performed within or both within and without this state if the service is localized in this state.

Service is deemed localized within the state if it is performed entirely within the state or is performed both within and without the state but that performed without the state is incidental to the employee's service within the state or is temporary or transitory in nature or consists of isolated transactions.

WCL §201 6 C. The term "employment" includes an employee's entire service performed both within and without this state provided it is not localized in any state but some of the service is performed in this state, and

1. the employee's base of operations is in this state; or
2. if there is no base of operations in any state in which some part of the service is performed, the place from which such service is directed or controlled is in this state; or
3. if the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, the employee's residence is in this state.

### **Based on the legal citations above:**

- An employee who works in NY, with only incidental work outside the state, is considered "employed" in NY and covered.
- An employee who works in another state, and only incidentally works in New York, is not considered "employed" in NY and is not covered.
- An employee who does not perform his or her work in any other single state is considered "employed" in NY and covered if some of his work is performed in New York and the employee is either:
  1. based in New York;
  2. controlled from New York; or
  3. the employee lives in New York.

### **NY Workers Compensation Board examples as guidance. New York Employee or out-of-state employee:**

- An employee who works from their home in New York is considered a New York employee even if the employer is located outside of New York State.
- An employee who lives in New York but works outside of New York is not considered a New York employee if the employer is located outside of New York.
- An employee that is required to travel occasionally into New York to perform duties, such as a salesperson, will not be considered a New York employee unless the employer is based in New York;
- An employee who doesn't have a worksite in any particular state but whose work is

directed/controlled by a NY based employer is considered working in NY.

**If an employer is headquartered in NYS but has locations in other states, is the employer obligated to cover these locations for NY PFL?**

NY DBL and NY PFL are mandated benefits for employees who work in New York, technically whose "employment" is in New York. Employers should refer NY WCL 201(6) to determine if any of their employees are not considered "employed" in NY and therefore are out-of-state not covered employees. The employer would need to secure DBL/PFL coverage for any employee under a location outside NYS, if the employee is determined to be "employed" in NYS per the legal requirements.

**Will guardian extend PFL coverage to out-of-state (OOS) employees that are currently covered on a DBL plan?**

No, Guardian cannot extend PFL coverage to out-of-state employees who are currently covered under an employer's DBL policy. Despite the history of the NY Department of Financial Services permitting employers to cover out-of-state employees for DBL, DFS declared that the PFL Program is a state-mandated benefit intended only to insure only employees "employed" in NY per the rules cited above. The NY Workers' Compensation Board does not have the authority to regulate the employment or insurance of out-of-state employees that are not covered by section 201(6)(c) of the WCL. The state where the out-of-state employees are employed may have its own disability or paid family leave requirements and has its own insurance law and regulations governing policies. Employers may cover their out-of-state employees with a disability policy governed by that state's law or choose to give paid time off for family leave under its own leave policies.

**Important note:** Guardian will, however, continue to cover OOS employees for NYDBL if elected by the employer.

**Can sole proprietors, legal partnerships, LLPs/LLCs, self-employed persons, e.g. independent contractors opt-in?**

Sole proprietors, partners in a legal partnership, members of a limited liability company (LLC), members of a limited liability partnership (LLP), and other self-employed persons are considered "individual business owners," so long as they are entitled to keep all the profits after taxes, are liable for all losses and do not have any employees. These persons do not have to be covered for PFL, but, if they have one employee or more, they must obtain DBL and PFL coverage for their employees. Sole Proprietors, partners in a legal partnership, members of LLPs/LLCs, and self-employed persons can obtain voluntary coverage for themselves (must opt in for both DBL and PFL, cannot opt in for one coverage only) effective January 1, 2018, or within 26 weeks of forming their business or of becoming a member of an LLC/LLP. If the person misses those dates, he/she can still obtain voluntary coverage for themselves and be endorsed onto the same DBL Policy/PFL rider as their employees. They would, however, be subject to a 2-year waiting period for PFL benefits, during which the regular community rate for PFL must be paid. Any covered employees of the Sole Proprietor, Partnership, or LLC/LLP would not be subject to the 2-year waiting period as a result of their employer being a late entrant (see NY WCL §212, OC-923 (9-16)).

PFL benefits are based on an employee's average weekly wage. For self-employed individuals, the average weekly wage is calculated by dividing the person's total earnings over the previous 52 weeks by 52.

**May spouses of a sole proprietor or legal partnership be excluded from PFL coverage?**

Spouses of sole proprietors and legal partnerships may be excluded from disability benefits coverage. Notice of Election to Voluntarily Exclude Spouse from Coverage (Form DB- 212.5) must be filed for NY DBL. The same rule would apply respecting PFL, but it's unclear if a form updated to address PFL will be published. (See NY WCL §212, OC-923 (9-16)).

### **If NYDBL is self-funded, must NY PFL be as well or can it be fully insured?**

An employer self-funded for DBL is not required to self-fund PFL. The employer may purchase PFL coverage from a private insurer or be covered through NY's State Insurance Fund (SIF). Guardian will not be offering stand-alone PFL in 2018.

### **What must employers do to self-insure NY PFL? Do employers that self-insure PFL participate in NY'S risk adjustment mechanism? Are they subject to the same reporting requirements as fully insured policyholders?**

DB-150 Application for Self-Insurance – Disability Benefits Law;

- Foundation documents (i.e. certificate of incorporation; partnership agreements; etc.);
- An original copy of the applicant's most recent independently audited financial statement;
- Security deposit – the amount is calculated based on the employer's full annual wages multiplied by up to one percent, subject to the WCB Chair's discretion
- Self-Insured Employers do not participate in the NY Department of Financial Service's (DFS) PFL Program Risk Adjustment – not subject to the risk adjustment mechanism nor part of the risk adjustment pool.
- Reporting to NY DFS – subject to similar quarterly data reporting requirements as all other employers.

### **What happens if covered employers don't comply with paid family leave?**

Failure to carry DBL and PFL is a misdemeanor punishable by a fine of not less than \$100 nor more than \$500 or imprisonment for not more than one year, or both, with increased monetary penalties for second and third or subsequent violations (NY WCL Article 9 § 220). Fines for non-compliant businesses will be based on the amount of the employer's payroll during the time the employer did not have required coverage (0.5% of payroll, and a further sum not more than \$500). If the organization fails to continue an employee's health

insurance during the leave, it will be liable for the employee's medical costs during the leave.

The NY Workers' Compensation Board (WCB) may audit an employer for any purpose related to the administration of NY PFL, including but not limited to, claim filing, dates of leave, return to work, payroll information, and written guidance to employees concerning employee benefits or leave rights, employer use of employee contributions to provide PFL, and employer compliance with posting requirements.

### **Staffing firm who place consultants with clients. What is the staffing firm's liability if the client says it does not want to wait for the consultant to return to work and terminates their employment?**

If the consultant is a covered employee, and not an independent contractor not covered by NYPFL for instance, then responsibility in this situation lies with the client not the staffing firm.

### **Can a group be covered for PFL with Guardian without using its absence management solution? Do they work in conjunction if a group has both?**

Yes, a group can be insured with Guardian PFL without using our Absence Management Solution. And yes, Guardian's Absence Management Solution would work in conjunction with PFL. The service helps businesses actively track and administer absences due to short-term disability, long-term disability, state and federal family and medical leaves, and company leaves.

### **Will Guardian be offering NY PFL on a standalone basis?**

No, at least not in 2018.

## **Covered Employees/ Eligibility Requirements**

### **Who are covered employees for NYPFL?**

Covered employees are employees who are "employed" in NYS (essentially meaning they work in NYS, see above FAQs) and are either working for a covered employer and don't fall into an excluded class OR are working for an employer who voluntarily provides PFL coverage.

### Examples of Covered Employees not often discussed but attention should be paid:

- Domestic workers, persons employed by one person or a couple in their own private household, such as nannies, chauffeurs, caregivers, gardeners ... employed forty or more hours per week are required to be covered if they work 30 or more days in a calendar year for that employer.
- A taxi driver, operator or lessee is an employee if the driver(s), operator(s) or lessee(s) of that employer work 30 or more days in a calendar year, unless such person is leasing a taxi from the owner of the taxi and the owner of the taxi personally, regularly drives the taxi an average of 40 or more hours a week.
- Leased employees are the employees of the company that is paying to lease them, and that company must have a disability benefits policy in its name. Regarding coverage requirements for the leasing firm (PEO) itself, individuals performing the administrative services of the PEO are counted as employees of the PEO. However, leased employees used by the clients of the PEO are NOT counted as employees of the PEO (counted instead as employees of the leasing client).

### Which employee types are not covered for NY PFL?

Below is a partial list. For a full listing and greater details see

<http://www.wcb.ny.gov/content/main/DisabilityBenefits/Employer/whoCovered.jsp>

- Employees who work for a "non-covered" employer, unless the employer opts-in for voluntary coverage;
- Any employee already receiving total disability benefits, such as under a claim for workers' compensation, state disability insurance (SDI), volunteer firefighters or volunteer ambulance workers' benefits. An employee may, however, supplement partial disability benefits with PFL benefits, up to the family leave benefit maximum. (WCL §206 3)

- An employee collecting unemployment benefits (State Unemployment Insurance SUI) due to their job termination would not be able to collect PFL (WCL §206 3).
- Employees on administrative leave (WCL §206 3)
- The minor child of an employer
- Government, railroad, maritime, or farm laborers;
- Ministers, priests, rabbis, members of religious orders, sextons, Christian Science readers;
- Individuals that volunteer their services for nonprofit organizations and receive no compensation;
- An executive officer of an incorporated religious, charitable or educational institution, or persons engaged in a professional or teaching capacity in or for a religious, charitable or educational institution.
- Persons receiving aid from a religious or charitable institution, who perform work in return for such aid
- One or two corporate officers who either singly or jointly own all the stock and hold all of the offices of a corporation that employs no other employees.
- Golf caddies.
- Daytime students in elementary or secondary school, who work part-time during the school year or their regular vacation period.
- True independent contractors and subcontractors
- Spouse of an employer (sole proprietor, legal partnership, LLC/LLP) that files a spousal exclusion form.

### Can an employee receive some PFL benefit even if they are receiving partial or reduced earnings under workers' compensation, volunteer firefighter or volunteer ambulance worker benefits?

Yes, if the employee is working at reduced wages, the employee may still be eligible for PFL.

### **If an employer pays for work done by a self-employed contractor who receives 1099 reporting, must the employer cover this person for PFL?**

Self-employed contractors are not "covered employees" for PFL purposes. Independent contractors are not eligible unless they purchase coverage for themselves. If they choose to purchase coverage, they must do so within 26 weeks of forming their business or becoming a member of an LLC/LLP. If they miss the window, they are subject to a 2- year waiting period. Independent contractors must still provide coverage for their employees and must be under the same policy as their employees if they choose to cover themselves.

### **Are full-time employees who collect or are eligible to collect social security disability benefits covered for PFL? If not, do they file how a waiver of some kind?**

Employees collecting Social Security disability benefits, including Social Security Disability Insurance (SSDI) and/or Supplemental Security Income (SSI), would not be covered for PFL. There doesn't appear to be any waiver type form required in circumstances such as this or when an employee is out on administrative leave because these employees wouldn't be "covered employees" in the first place (not covered for PFL, no employee deductions). The PLF waiver form is intended for covered employees (covered by the PFL law) that will not meet the eligibility requirements (temporary or seasonal employees with work schedules that will not meet the 26 consecutive weeks if working 20 or more hrs/week, 175 working days if working less than 20 hrs/week requirements) (PFL-WAIVER (9-17)).

### **How is employee eligibility determined?**

Employee whose Regular Employment is 20 Hours or More Per Week. Employees whose regular employment schedule is 20 or more hours per week are eligible to take PFL from that employment after working at least 26 consecutive work weeks preceding the first full day family leave begins.

Employee whose Regular Employment is Less than 20 hrs Per Week. Employees of a covered employer whose regular employment schedule is less than 20 hours per week are eligible to take PFL from that employment after working 175 workdays preceding the first full day of the leave. The NY WCB clarified that the regulation

requirement that the employee be "working 175 days in such employment," means after the 175th day worked, and not after 175 calendar days of employment.

\*\*\*As with NY DBL, once an employee meets the eligibility requirements for NY PFL, the employee remains eligible for the duration of their employment, regardless of a change in their work schedule.\*\*\*

### **Rules for Determining Employee Eligibility:**

- The eligibility requirements (26 consecutive weeks or 175 workdays) is not required to be within a 52-week period, in other words the employee would not need to meet the eligibility requirements each year. Eligibility is from date of hire, once met for either, they do not need to be met again in ensuing years. Once an employee has met eligibility requirement specific to the type of employee the person is (employee that works 20 or more hours/week, employee that works less than 20 hrs/week), the employee remains eligible for the duration of their employment.
- Employee Going from Part-Time (less than 20 hrs/week) to Full-time (20 or more hrs/week) and vice versa. Once an employee meets eligibility in their work schedule, they remain eligible even if they drop in hours (going from FT to PT for example). If, however, the employee has not yet met eligibility and started as FT then moves to PT, then any weeks worked as FT gets counted toward the 175 workdays eligibility criteria. And, if switching from PT to FT, then the days worked toward the 175 day calculation counts toward their 26 consecutive weeks eligibility criteria.
- An employee's use of paid time off (e.g. vacation time, personal, sick or other time away from work) count toward the consecutive work weeks (the 26 consecutive weeks) or days worked (the 175 workdays) if the employer continued to deduct the employee's contributions (if employee deductions are being taken) during that time.
- Periods of temporary disability (DBL) are not be counted as weeks of employment or days worked.
- The "consecutive workweek requirement" may be tolled during periods of absence (not considered a

lapse, still considered consecutive) that are due to the nature of that employment, such as semester or other planned breaks, and when employment is not terminated during these periods. Example: If an employee worked 22 weeks up until the May 15 – August 15 semester break, the weeks when the employee isn't working during the period of 5/15 to 8/15 would not count as a break in the consecutive nature of employment, and rather the consecutive 23rd week would begin 8/16.

### **Can an employee opt out of PFL or it is mandatory?**

PFL coverage is not optional. An employee can only opt out of coverage if they will not meet the eligibility criteria and file a PFL waiver (PFL-WAIVER (9-17) (11 NYCRR 380-7.6).

### **If someone is out on company leave, is that a gap in employment?**

No. An employee's use of paid time off (e.g. vacation time, personal, sick or other time away from work) count toward the consecutive work weeks (the 26 consecutive weeks) or days worked (the 175 workdays) if the employer continued to deduct the employee's contributions (if employee deductions are being taken) during that time.

### **How do the eligibility rules apply to per diem workers?**

The same eligibility rules apply. If the per diem employee works 20 or more hours per week, the employee is eligible for leave after 26 consecutive weeks of employment. If the per diem employee works less than 20 hours per week, then the employee is eligible after working 175 days in such employment.

\*\*\*If day-to-day hiring is the usual employment practice of a trade or business, then an employee regularly employed by the employer is eligible when he or she is employed during the work period usual to and available to the trade/business during the entirety of the 26 consecutive weeks preceding the first full day of the leave.

### **Does the time working as a temporary employee count toward determining eligibility?**

Yes. A temporary employee would be eligible for coverage if it meets the eligibility requirements. Same goes for per diem or seasonal workers.

### **What about seasonal businesses where employees may meet the 26 consecutive weeks work period requirement but are laid off between seasons?**

These employees would maintain their eligibility when they resume working the following season. Where a full-time employee works for a covered employer for more than 26 weeks (thereby acquiring eligibility), but is then laid off by the covered employer due to the seasonal nature of the employer's work, but is then rehired by the same employer a month or a couple of months later, the law would not require the employee to work for the same covered employer another 26 weeks prior to regaining eligibility. As stated above in the rules for determining employee eligibility, once an employee has met eligibility requirement specific to the type of employee the person is (employee that works 20 or more hours/week, employee that works less than 20 hrs/week), the employee remains eligible for the duration of their employment.

### **If you have a seasonal business that is not open 6 months of the year, do the employees have to fill out the waiver of coverage form?**

A covered employer with employees who are not going to meet the eligibility requirements must provide those employees the option to complete and submit the PFL-Waiver.

### **Example: we are a construction company that typically experiences layoffs in the down season. I wouldn't know if my employees will meet the eligibility requirement until after the fact, since I may not know in advance what the season holds in terms of work projects. Should I take the employee PFL deductions or offer the employees the option to sign the PFL waiver?**

The "Rules for Determining Employee Eligibility" above clarify that the eligibility requirements (26 consecutive weeks or 175 workdays) is not required to be within a 52-week period, i.e. the employee would not have to have meet these time requirements in the year 2017 alone to

be eligible for NYPFL in 2018 and again each ensuing year. Rather, eligibility dates back to the date of hire. Once an employee has met eligibility requirement specific to the type of employee the person is (employee that works 20 or more hours/week, employee that works less than 20 hrs/week), the employee remains eligible for the duration of their employment, irrespective of breaks in employment.

If this remains questionable based on the specific circumstances of your case, Guardian recommends you contact the NY WCB at PFLinquiries@wcb.ny.gov or the Paid Family Leave Helpline at 844 337 6303.

**What happens if an employee moves from working less than 20 hours per week to working 20 or more hours per week, does the employee get credit for the days worked under 20 hours per week?**

An employer may either convert the days already worked to a number of weeks or it can continue counting the days worked until the employee reaches eligibility.

**What if an employee met the 26 consecutive week period with one employer, but then moved to work for another employer?**

The eligibility period would start anew. The employee must again meet the 26 consecutive work week requirement.

**If we have an employee that works more than 175 days per year but only works one hour in each of those days, does he/she have the deductions taken from their paycheck?**

Yes. For employees who work less than 20 hours per week, as long as the 175 workdays requirement has been met, deductions are required to be taken, regardless of the number of hours worked per day.

**A new employee ceases working after being employed only 25 consecutive weeks to care for his spouse and seeks 8 weeks family leave. Can PTO bridge the gap between week 25 and 26 to allow for eligibility?**

The NY WCB advised that it thinks the regulations would allow for this since the PTO time taken would count toward the 26th consecutive week worked, and the PTO paid week would reduce the PFL benefit period allotment by that one week.

**How does this work for a new employee? When is a new employee able to first take PFL leave?**

A new employee with an employment start date of 10/1/17 is not eligible for their first day of leave until they have worked for 26 consecutive weeks, so not prior to 4/1/18.

HOWEVER, the new employee should not be offered the option to waive PFL coverage, if the expectation is their work schedule will allow them to meet the eligibility requirements in the course of their employment.

**How does the PFL waiver work?**

- Employers must identify temporary or seasonal employees whose work schedules will not meet the eligibility requirements: work schedule is 20 hours or more per week, but the employee will not work 26 consecutive weeks, or work schedule is less than 20 hours per week but the employee will not work 175 days in a 52 consecutive week period (1 year).
- Employers are required to these employees with the Employee opt - Out of Paid Family Leave Benefits waiver form (PFL-WAIVER (9-17)), which the employee may elect to complete and file with its employer. The employer must keep a copy of any fully executed waiver on file to be produced at the request of the Workers' Compensation Board Chair, for as long as the employee remains in employment with the covered employer.
- An employee who does not elect to file a waiver must make regular family leave benefit contributions for the full duration of his or her employment with the covered employer, and the covered employer must provide family leave benefits for such employee when he or she is eligible.
- Within eight weeks of any change in the regular work schedule of an employee that requires the employee to continue working for 26 consecutive weeks or 175 days in a 52 consecutive week period, the PFL waiver filed would be deemed revoked, and the employee will be obligated to begin making PFL contributions, including any retroactive amounts due the beginning of the policy year as soon as the

employee is notified by the employer of such obligation.

### **Private employers with employees exempt from PFL; voluntary coverage (opting-in to NYPFL)**

All private employers that have at least one employee (excluding the owner) working in New York on each of 30 days in any calendar year are required to have NYPFL; however, a private employer may have one or more subsets of employees who are exempt from the NY DBL and NYPFL laws. An employer may choose to offer those employees NY DBL and NY PFL on a voluntary basis, they cannot offer one or the other (in contrast to public employers) and would need to cover the entire class of otherwise excluded employees (see 12 NYCRR 355.2, WCL § 212(1)).

Please note that Guardian cannot determine if an employer has employees exempted from coverage. We recommend referring to New York Workers' Compensation Law (Article 9 WCL §201; 12 NYCRR 355.4) and working with your legal counsel to make these determinations.

Generally speaking, voluntary coverage may be obtained for compensated employees in New York State employment for whom disability and paid family leave benefits are not required by law (NY WCL §212). Employers who wish to provide voluntary coverage must complete an application for voluntary coverage (Forms DB-135 or DB-136 for DBL and PFL-135 or PFL-136 for PFL), except employers already providing DBL voluntarily do not need to complete and submit forms PFL-135 or PFL-136 unless employee deductions are not taken for DBL but will be taken for PFL, in which case PFL-136 must be submitted. Once approved, the employer is a "covered employer" subject to the Article 9 of the NY Workers Compensation Law. For instance, voluntary coverage must be maintained for not less than one year, and, if an employer wishes to discontinue voluntary coverage, they must provide ninety (90) days written notice to the Chair and to the employees, with provisions made for the payment of obligations incurred on and prior to the effective termination date. Unlike public employers opting-in for NYPFL, private employers doing so for otherwise excluded class or classes of employees

are not required to provide the employees 90 days notice prior to taking deductions toward PFL premium.

Voluntary coverage may be provided for the following otherwise excluded classes of employees:

- a minor child (less than 18 years old) of the employer.
- a domestic or personal worker in a private home who is employed for less than forty hours per week by any one employer.
- a duly ordained, commissioned, or licensed minister, priest or rabbi, a sexton, a Christian Science reader, or member of a religious order.
- one or two executive officers of a corporation that has no other employees, who at all times during the period involved owns all of the issued and outstanding stock of the corporation and holds all of the offices and have no other employees (one or two executive officers of a corporation who at all times during the period involved own all of the issued and outstanding stock of the corporation and hold all the offices and have other employees may elect to be voluntarily excluded from coverage).
- an executive officer of an incorporated religious, charitable or educational institution, or persons engaged in a professional or teaching capacity in or for a religious, charitable or educational institution.
- volunteers in or for a religious, charitable or educational institution, or persons participating in and receiving rehabilitative services in a sheltered workshop operated by a religious, charitable or educational institution under a certificate issued by the US Department of Labor, or recipients of charitable aid from a religious or charitable institution who perform work in or for the institution which is incidental to or in return for the aid conferred, and not under an express contract of hire.
- persons performing services for a public authority, municipal corporation or a fire district or other political subdivision.
- persons performing services as farm laborer

### **Are employees working for non-profit organizations exempt from PFL?**

Other than a nonprofit with NO compensated individuals providing services; or the exceptions listed under Non-Profit Religious, Charitable and Educational Institutions (below), individuals working for a nonprofit organization are covered for DBL/PFL the same as those working for a for profit business.

### **Closer look at non-profit religious, charitable or educational institutions (12 NYCRR §355.2)**

Religious, charitable or educational institutions operating on a non-profit basis are required to obtain DBL/PFL insurance or to provide DBL/PFL benefits through approved self- insurance to all of their employees, with exceptions, as noted below, if they employ one or more employees.

The following classes of employees are excluded from mandatory coverage, but voluntary coverage may be provided as addressed in the "Private Employers with Employees Exempt from PFL; Voluntary Coverage (Opting-in to NYPFL)" FAQ above:

- a duly ordained, commissioned or licensed minister, priest or rabbi; a sexton; a Christian science reader; a member of a religious order (12 NYCRR §355.2); or persons participating in or receiving rehabilitative services in a sheltered workshop operated by such institutions under a certificate issued by the U.S. Department of Labor;
- volunteers in or for such institutions, such as an uncompensated executive officer;
- recipients of charitable aid from a religious or charitable institution who perform work in or for such institution which is incidental to or in return for the aid conferred, and not under an expressed contract of hire;
- persons engaged in a professional or teaching capacity in or for a "religious, charitable or educational institution"; or an executive officer of an incorporated religious, charitable or educational institution

### **With respect to the exemption from DBL/PFL for persons engaged in a professional or teaching capacity for a religious, charitable or educational institution, what does "professional capacity" mean?**

12 NYCRR 355.2

(d)A person engaged in a professional capacity is one:

1. whose primary duty consists of the performance of work:
  - requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual or physical processes; or
  - original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and
2. whose work is not subject to routine supervision and which requires the consistent exercise of discretion and judgment in its performance; and
3. whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
4. who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this subdivision.

### **Does an employer have to give 90 days notice to term their DBL for a non- covered class if they wish not to cover the class for PFL?**

First, a private employer cannot voluntarily cover an otherwise excluded (from DBL and PFL) class of

employees for DBL and not PFL. If voluntarily covering DBL, the employer must also voluntarily cover PFL (WCL § 212(1), 12 MYCRR 355.2).

Employers and individuals providing voluntary coverage must maintain such coverage for at least one year and may only cancel such coverage after having provided 90 days notice of cancellation to all affected employees and to the WCB in the format prescribed by the Chair.

## Premium Payments/Employee Contributions

### How is the PFL premium payment funded?

The PFL coverage is to be entirely funded by employee payroll deductions. No employer contribution is required. Employers are, however, able to voluntarily cover the premium expense themselves.

### Is the PFL employee contribution a separate and different amount from DBL employee contribution?

Yes. The DBL employee contribution remains unchanged. A new and separate PFL contribution will be required.

### Is this in addition to the current SDI/SUI \$.60?

State Disability Insurance and State Unemployment Insurance are state-levied fees used to provide benefits for unemployed employees, or employees who otherwise are unable to work. Employees collecting unemployment benefits are not eligible for NY PFL. If by chance, the questioner's reference to \$.60 is intended to be to NY DBL and not SDI/SUI, then NYPFL would be in addition to NYDBL.

### Should an employer collect PFL contributions while an employee is receiving DBL?

NY Workers Compensation Board advised that this is at the employer's option, but because contributions are taken from wages, this may only be an option when the employer is paying the employee wages while out on leave. If the employee is simply collecting benefits, the employee has no wages from which an employer can take the deductions. Also, employers cannot collect PFL contributions from an employee who is not yet eligible

for PFL while that employee is out on DBL. The exception is to accommodate section 380-2.5(e), if an employee is not yet eligible for paid family leave and the period does not count toward eligibility, it would be inequitable to allow an employer to collect contributions from the employee during that time.

### When do we need to start deducting this from our employees checks?

By 1/1/18, but deductions could begin as early as 7/1/17.

### A payroll vendor recently sent an email to its clients stating that they will begin deducting for PFL on 7/1 unless directed not to. Can they do that?

It is the planholder's decision whether to take early deductions or not. The State is allowing planholders to take deductions any time after 7/1/17. Guardian will not be prepared to accept premiums prior to the 4th quarter 2017. Planholders are advised to seek the services of competent legal and/or tax counsel to determine their obligations.

### What if an employer forgets to start employee deductions? How much can they go back and charge the employee and take from their check?

As indicated in the NY WCB regulations, an employer's failure to withhold may not be recovered by withholding larger than the maximum employee contribution at a later date.

### Is there a 30 day grace period on an employer taking deductions?

The WCB regulations do not provide a 30-day grace period for employee deductions.

### What advantage is there, if any, to beginning deductions July 2017 or any time prior to 2018?

The State is allowing employers to take early deductions to fund the NY PFL premium that is due for 2018. Many of Guardian's planholders are billed on an annual in advance basis. Since these planholders will be receiving a bill for NY PFL for premiums in advance of the 1/1/18 effective date, they may want to consider taking early deductions to fund the premium due.

**What if the employer does not start early deductions in 2017? If they start the deductions on 1/1/18, can those employees still be eligible for PFL on 1/1/18?**

Yes, covered employees who meet the eligibility requirements are eligible effective 1/1/18, irrespective of when the deductions are made by the employer.

**Who is funding this if an employer is trying to collect in 2018 and there is not enough money collected yet from employees?**

The employer.

**If an employer collects premiums in advance, do they need to hold the funds in a trust or a separate account?**

Guardian will not be maintaining a separate account to hold premium contributions received in advance of the first billing date for the coverage effective date of 1/1/18. Planholders are advised to seek the services of competent legal and/or tax professionals to determine their obligations.

**Will each employer have a fund that premiums go into and NY PFL will be paid out of? Not sure I understand why you are not accepting the deductions as of now in order to fund employees accounts?**

No, separate funds will not be maintained by Guardian for employer groups. Employers are instructed to consult with their tax advisors and payroll vendors to determine if it should be setting up some separate account to accept employee deductions prior to 1/1/18.

**If an employer starts to take deductions on 7/1/2017 and an employee leaves prior to 12/31/2017, will that employee be entitled to receive a refund of the premiums they paid?**

No, employers are not required to reimburse employees for contributions paid prior to their termination.

**What if an employer finds it deducted employee contributions in excess of the annual premium due?**

A covered employer must use its employees' contributions to provide PFL benefits to employees and must promptly return to employees any surplus in employee contributions that exceed the annual premium (12 NYCRR 380-7.2).

**For part time employees where payroll fluctuates, how should their deduction be calculated? By quarterly wage?**

Some employees may earn wages on an irregular schedule, such as where commissions or bonuses are part of an employee's wages. To ensure a stable and functioning PFL market, insurers should collect the correct premium based on the total annual wages earned by employees. Each insurer must collect premiums equal to 0.126% of the employee's annual wages for the calendar year up to and not exceeding 0.126% of the annualized statewide average weekly wage. For the calendar year 2018, the annualized statewide average weekly wage is \$67,904.84, which means the maximum annual premium to be charged to an employee for paid family leave benefits coverage for 2018 is \$85.56.

**Are the rates on our quarterly NY DBL invoices going to increase? Right now it is \$2.30/male and \$5.00/female?**

Your DBL rates will not increase. However, there is a separate rate for PFL coverage. The DBL and PFL premium will be reported in one invoice, but separate rates will apply to DBL and PFL.

**Will guardian provide its stakeholders with the annual rate change?**

It is anticipated that NY Department of Financial Services (DFS) will publish the paid family leave rate annually by September 1 for the following calendar year. The NY Department of Labor will publish the Statewide Average Weekly Wage every July 1, Guardian will post the rate on its Guardian Anytime website.

**I understand that the rates are based on an employee's salary but how are "wages" defined? Does it include PTO, only worked earnings?**

The maximum employee contribution in 2018 shall be 0.126% of an employee's weekly wage, up to the annualized New York State Average Weekly Wage. "Wages" includes every form of remuneration for employment paid by the employer to his employee, whether paid directly or indirectly, including salaries, commissions, bonuses and the reasonable money value of board, rent, housing, lodging or similar advantage received (see 11 NYCRR 363.3(o) and 12 NYCRR 357.1).

**Are the premiums based on base wages, base plus commission, bonus, overtime, etc.?**

Yes, the total reported wages for employees would include all of the above that apply.

**We have employees whose pay rates change 2-3 times per year. How will this work for the deductions?**

An employer, or their payroll vendor, will need to keep track of any pay changes during the year and deduct employee contributions accordingly. Should an employee's wage rate, average number of work hours per week, or salary change, the employee's average weekly wage shall be recalculated on a quarterly basis to accommodate salary changes on January 1, April 1, July 1, and October 1.

**How do you determine the rate to deduct for a new hire if you do not have an 8 week look back?**

If the employee hasn't been working for the employer for 8 weeks, the employer is to determine the average weekly wage based on the wages for time the employee has worked thus far. This rate would be applicable for the entire calendar year unless the employee's wage rate, average numbers of work hours per week, or salary changes, in which case, the employee's average weekly wage shall be recalculated on a quarterly basis to accommodate salary changes on January 1, April 1, July 1, and October 1. In the case of a self-employed person, the average weekly wage for such person shall be the greater of the person's self-employment income (as defined in 26 U.S.C. §1402(b)), for the previous full calendar year divided by 52 weeks, or the statewide average weekly wage. If there is not 52 weeks of self-employment income for the previous full calendar year, then the person's average weekly wage shall be the greater of the sum of the person's wages for the previous calendar year plus the person's self-employment income (as defined in 26 U.S.C. §1402(b)), divided by 52 weeks, or the statewide average weekly wage. A self-employed person's average weekly wage shall be applicable for the remainder of the calendar year.

**How will Guardian obtain the employee income data of a group to determine the case premium?**

NY PFL will be billed on a self-reported basis. The employer will be responsible for submitting the total

average weekly wages for the employees. At claim time, this information would be submitted on the claim form and verified.

**Are employers required to send notifications of some kind to employees before they take deductions, especially if doing so prior to 1/1/18? Is any template or model notice available yet?**

No rule or guidance has been issued on this subject. Guardian is not aware of a requirement that the employer provide its employees advance notification of the contribution deductions.

**If an employee was recently hired by an employer, will the employer begin to deduct employee contributions prior to the employee having worked for 6 consecutive months?**

With the exception of any employees eligible for a PFL waiver because they will not be able to attain eligibility, yes, employers should begin deducting PFL contributions from employees as of the first day of their employment.

**We have per diem employees who work occasionally, do we take the deductions out for them upon hire?**

Yes, if the per diem employee is expected to meet the eligibility requirements. But if the employee will not or is not expected to meet the eligibility requirements, the employer is required to provide the PFL waiver form to the employee to exercise its option to waive PFL.

**We have some employees who work for and are paid three separate paychecks from three New York companies under the same NY umbrella company? Do we take deductions from all three salaries, and could the employees get paid triple benefits for the same PFL leave period taken?**

This is a very interesting question and one we would think the NY WCB would want to weigh in on, and we would recommend you contact the NY WCB directly at PFLinquiries@wcb.ny.gov or the Paid Family Leave Helpline at (844) 337-6303. Your thought to treat such employees as an employee for one of the three companies for purposes on NYPFL is logical to us, as it would make the most sense economically especially as the employee may never take paid family leave and would

be paying 3x as much in deductions as other employees. If the company is not taking deductions and is paying the premium itself, it may avoid this concern.

**Employees contribute to this plan, but if unused, is there any bank or deduction for payments not used?**

No. Whether benefits are used or not, employee deductions are still required to be taken.

**If the benefits are not being claimed for anyone in a particular year, what happens to the deductions taken (does this work like insurance?)?**

Yes, NY PFL operates like insurance. The premium is retained by the carrier. It counts towards the carrier's annual loss ratio calculation provided to the NY Department of Financial Services in operating its risk adjustment equalization process across NY PFL carriers.

**Will variable pay employee rates be set? For example, servers?**

Not for 2018. The rate released for 2018 will be the same rate for all eligible employees.

**Unlike CA PFL, where contributions get paid through SDI and directly to the state of CA, is NY PFL taken out of an employee's paycheck and the employer pays the premium?**

Correct – contributions for PFL are deducted from employee paychecks, and the employer pays Guardian. Despite the provision that PFL is to be entirely funded by employee contributions, an employer may choose to pay the entire cost of the PFL premium and not take employee deductions.

**What are the major things I should know about employee contributions?**

- Employee deductions don't need to start before 1/1/18. Just note that if you start later than 1/1/18, you can't retroactively collect payroll deductions for PFL (for example, if you miss implementing withholdings for January 2018, you can't take a catch-up contribution in February).
- While PFL is frequently referred to as an employee-funded benefit in the law, an employer can choose to pay the cost for their employees.

- If an employer chooses to take employee deductions before 1/1/18, they don't have to refund those PFL deductions if the employee leaves the company before 1/1/18.
- After 1/1/18, PFL deductions apply from time of hire.
- An employer must pay the premium for the entire group of covered employees whether deductions are taken from employees or not.
- The contribution rate may change every year.
- While an employer can choose to collect DBL and PFL employee contributions from an employee who is out on DBL or PFL, an employer cannot collect PFL contributions for an employee who is not yet eligible for PFL while that employee is out on DBL.
- A covered employer must use employees' contributions to provide PFL benefits to employees and must promptly return to employees any surplus in employee contributions that exceed the annual premium.
- The contribution amount of 0.126% of an employees' weekly wages up to the annualized New York State Average Weekly Wage is the maximum amount that can be withheld. An employer's failure to withhold may not be recovered by withholding larger than the maximum employee contribution at a later date.
- An employer cannot collect more than the maximum allowable contribution for PFL through payroll deductions. If it does, the employer must return the excess amount to the employee(s).

## Billing

**Will the premium bill show PFL as a separate line item?**

Yes. Both PFL and DBL will appear on the same bill but in separate sections. Carriers covering employers for DBL and PFL must apply any amount received to both the DBL and PFL coverages equally. Likewise, any cancellation resulting from unpaid premium would apply to both DBL and PFL.

**If a planholder is set up to pay premium annually in advance for DBL, can it elect to be billed monthly instead for PFL?**

No, Guardian's approach to billing is that the same billing mode (annually, quarterly or monthly) used for DBL will also be used for PFL.

**If a client currently pays their Guardian DBL quarterly in arrears, can they assume that billing schedule for NY PFL?**

Yes. Billing mode (quarterly in arrears, monthly in advance or annually in advance) will be the same for DBL and PFL.

**Will Guardian charge an administrative fee for NY PFL above and beyond the standard employee deduction?**

No not with respect to the requisite PFL coverage itself. The inclusion of absence management or other administrative services separate from the actual payment and administration of the PFL benefit may entail additional costs.

## Taxability

Federal taxability of Paid Family Leave is unclear when its paid from a private insurance plan, as opposed to a State plan, as the IRS has not ruled or provided guidance on its treatment. The New York State Department of Taxation and Finance ("NYS Tax Department") did, however, release guidance related to the taxation of PFL premium contributions and benefits on August 25, 2017 (N-17-2).

While Guardian is very pleased the NYS Tax Department released this rather unexpected guidance, some critical items remain in question, and Guardian continues to seek clarification. The NYS Tax Department guidance is shared below, but we heed employers to consult with their own independent legal and/or tax counsel.

**NYS Tax Department Guidance (N-17-2):**

- PFL benefits paid to employees will be taxable income that must be included in employees' federal gross income;
- Taxes will not automatically be withheld from benefits, but employees may request voluntary tax withholding;

- Premiums, which may be paid for by employee wage deductions, should be deducted from employees' after-tax wages;
- Employee wage deductions should be noted on their Forms W-2; and
- An employee's PFL benefits should be reported by the State Insurance Fund on Form 1099-G, or 1099-MISC, as applicable.

Guardian will be reporting PFL benefits on the 1099-MISC. For 2018, Guardian will not be withholding any federal or state taxes. For any additional tax-related questions, planholders should seek guidance from their tax advisors.

## Claims/Leave Requests/PFL Benefits

**What types of leaves does NY paid family leave cover?**

NY PFL was instituted to provide expanded benefits for employees (regardless of gender) for paid family leave not related to the employee's own health condition. It provides leave for the following three bases:

- Bond with a newly born, adopted, or fostered child;
- Care for a family member (spouse, domestic partner, child, parent, parent-in-law, grandparent, or grandchild) with a serious health condition; or
- Assist loved ones when a family member (spouse, domestic partner, child or parent) is deployed abroad on active military duty.

**Who are benefits paid to, employee or employer?**

Benefits are paid to the employee directly unless the employer asks the carrier to reimburse them because they paid the employee through tier voluntary use of accrued PTO.

**Who pays the employee the benefit? The employer or Guardian?**

The employer's PFL insurer pays the PFL benefit to the employees.



### **Will the claim forms be available on Guardian's website for our Guardian groups?**

Yes, the PFL claims form, instructions, and all related forms (i.e. medical authorization release) will be on our PFL- dedicated Guardian Anytime page ([www.guardiananytime.com/NY-paid-leave](http://www.guardiananytime.com/NY-paid-leave)).

### **What type of proof/certifications will be required to submit for eligibility determination?**

There are certifications and/or documentation of proof requirements applicable to each of the three types of leave, i.e. provider medical certification of a family member's serious medical condition, certification for leave taken for a qualifying military exigency, birth certificate or other acceptable evidence of a child's birth and the employee's parental filiation.

### **Who submits the claim, employee or employer? What's the review timeframe?**

The employee submits the request for paid family leave (form PFL-1), but there is an employer section to be completed and returned to the employee within three days for the employee's submission to its employer's PFL insurance carrier.

Carriers have three days to send acknowledgment of a completed claim, and 18 days to pay or deny the claim, which runs from receipt of the completed claim. If a carrier receives a completed claim request more than 18 day prior to the PFL qualifying event (a pre-filed claim), the carrier has 5 days (not 5 business days) to pay or deny the claim.

### **What happens if the request for paid family leave form is incomplete?**

If the carrier or self-insured employer determines the request is incomplete, it must provide the employee within five (5) business days a list of the information missing with the corresponding data field (except if the claim is submitted telephonically, as permitted) and information regarding arbitration should the employee have any disputes.

### **How long do you anticipate it will take for an employee to receive payment from you?**

Once the carrier receives a completed request for PFL with the necessary certifications and/or proof of claim documentation, as applicable, the carrier must pay the claim or deny the claim within 18 days. In the event a completed request is received more than 18 days before the occurrence of a qualifying event, the carrier must send payment to the employee within five days following the qualifying event.

### **When will an employee be paid?**

Within 18 days of filing a complete claim for benefits, the Paid Family Leave insurance carrier (or the employer if the employer self-insures) must pay or deny the employee claim and provide an explanation of the denial. If the employee goes on leave before the claim is approved within the 18 day period, the benefits may be paid retroactive to the leave start date (barring any denial or partial denial due to lack of notice of a foreseeable leave). The employee could also opt to use any accrued vacation, sick or other leave time during this period to receive payment while out on PFL.

### **If an employer does not complete or fully complete the employer section on the request for paid family leave, can an employee's claim be denied?**

No. An employee's claim may not be denied because the employer section of the Request for Paid Family Leave is incomplete, but it may be pended for the receipt of the completed employer section.

### **How will PFL claim disputes be resolved?**

Disputes about claims (such as eligibility, benefit amount, or duration) will be resolved through arbitration. Disputes pertaining to job-related discrimination or retaliation will be heard by the Workers' Compensation Board.

### **What happens if a claim is denied?**

The claimant would receive a denial letter (copy to the employer) informing the employee of its right to seek arbitration and the process for doing so. Requests for arbitration are initiated by submitting the completed request for arbitration to the dispute resolution forum

with a \$25 filing fee, and by sending a copy of the arbitration request to the responding parties (employer, carrier). A request for arbitration must be submitted within 26 weeks of written notice of denial of the claim in the format prescribed by the NY WCB. When it is alleged that the employer did not have paid family leave insurance or was not self-insured, the WCB must be sent a complete copy of the request for arbitration. If the employee prevails on his or her claim, 25 dollars will be added to the benefits paid to an employee by the insurance carrier or self-insured employer (12 NYCRR 380-9)

### **Is an employee required to provide its employer advance notice of a leave claim?**

Yes. When leave is foreseeable, an employee must provide an employer with at least 30 days notice before the date the leave is to begin of the employee's intention to take leave. If 30 days notice is not possible, the employee must provide notice as soon as practicable (12 NYCRR 380-3).

**Foreseeable leave.** An employee must provide the employer with at least 30 days advance notice before leave is to begin if the qualifying event is foreseeable. Foreseeable qualifying events include an expected birth, placement for adoption or foster care; planned medical treatment for a serious health condition of a family member; the planned medical treatment for a serious injury or illness of a covered service member; or other known military exigency. If 30 days notice is not practicable for reasons such as a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. The employee must advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

**Leave Not Foreseeable.** When the approximate timing of the qualifying event and need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the qualifying event. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements

applicable to such leave. "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a qualifying event less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.

**Employer Waiver of Notice.** An employer may waive the notice requirements.

**Compliance with Employer Policy.** To the extent that a covered employer's rules about requesting leave may be less stringent than the NY WCB rules, an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, PFL may be delayed or denied.

Advance notice to carrier by employees not required;  
Advance Notice by Individual Business Owners Required.

The employee is not responsible for providing advance notice of foreseeable leave to the carrier beyond the requirements stated in filing a request for paid family leave. Except, an individual business owner who has purchased family leave coverage must give 30 days notice to his, her, or their carrier and otherwise comply with the provisions of this Subpart.

Failure to give 30 days advance notice for foreseeable leave. When the need for family leave is foreseeable and an employee fails to give 30 days advance notice, the self-insured employer or the carrier may file a partial denial of the family leave claim for a period of up to 30 days from the date notice is provided.

### **What are the notice requirements for an employee to take intermittent leave?**

An employer may require the employee provide notice as soon as is practicable before each day of intermittent leave. An employee shall advise the employer and carrier of the schedule for intermittent leave. When the dates for leave are not specified on the Request for Paid Family Leave, the carrier or self-funded employer may withhold

payment pending submission of a request for payment together with the date of leave. Payment must be completed as soon as possible, but in no event more than 18 days from the date of the request (12 NYCRR 380-4.1). Also, an employee must request payment for a previously unspecified day of family leave within thirty days of the leave (NY WCL §217).

#### **What is needed when submitting a claim for bonding with a newborn child? Birth certificate?**

In addition to the PFL-1 form, documentation for the birth mother would be a birth certificate or documentation of pregnancy or birth from a health care provider.

Documentation for a second parent would be a birth certificate or a voluntary acknowledgment of paternity or court order of filiation or a copy of the documentation of pregnancy or birth from a health care provider and a second document verifying the parent's relationship with the birth mother or child.

#### **Can an employer require the employee to return all forms to the employer and the employer submit the forms?**

No. Once the employer receives a request for family leave from an employee, the employer must complete the employer information contained in Part B of the Request for Paid Family Leave form (form PFL-1), or any other carrier or self-insured employer designated format, and return it to the employee within three business days. The employee then submits the request for PFL with the information supplied by the employer and with any necessary certifications or proof of claim documentation, medical or otherwise, to the carrier or designated third-party administrator

#### **Is the first week taken off unpaid like it is for disability benefits?**

No, there is no waiting or elimination period for family leave benefits. Benefits are payable if the employee is eligible the first full day when leave is required.

#### **Can PFL benefits be paid during the one week DBL waiting period?**

No. This would be tantamount to PFL and DBL running concurrently, which they may not.

#### **Is 8 weeks per event/reason or per year?**

For 2018, the 8 weeks is the maximum length of paid leave for the entire year. The maximum length of paid leave will be 10 weeks in 2019 and 12 weeks from 2020 on.

#### **If an employee has multiple PFL claims within the year, the maximum PFL time allowed is 26 weeks within a 52 week period? Is that a rolling 52 weeks?**

The 52-consecutive week period for calculating an employee's maximum paid family leave duration is computed retroactively for each day leave is claimed.

#### **DBL will not run concurrent with PFL, correct? When DBL expires, will PFL kick in?**

Correct – DBL and PFL will not run concurrently. PFL won't automatically kick in after DBL expires. If an employee's DBL benefits are exhausted and they want to take PFL for a qualifying reason, a leave request will need to be submitted to Guardian. There is no strict order in the leave taken, i.e. an employee may take DBL, then PFL, and then DBL again if their circumstances require, as long as the maximum leave entitlement for both DBL and PFL do not exceed 26 weeks in a 52-week look back period.

#### **When is an employee eligible for their second PFL period? Is it 52 weeks from the first day of the initial leave? Or does the employer designate the 52 week period such as calendar year?**

It is 52 weeks from the first day of the initial leave. The 52 week period is not based on the calendar year or the planholder's policy year, it is calculated based on the employee's initial DBL or PFL claim date. An employee is eligible for benefits in a retroactive 52 week period, the 52 weeks are computed "retroactively with respect to each day for which benefits are currently being claimed" (12 NYCRR Sec 355.9(8)). This means an employee would "earn time back" at the end of a 52 week period such that the employee can start getting a week here and there on the rolling back of the 52 week period.

### How do periods of leave work between DBL and PFL?

**Note.** A key differentiator between PFL and DBL is that DBL is taken for employees' OWN non-occupational injury or illness, while PFL is taken to care for someone else.

- NY DBL and NYPFL cannot run concurrently, that is, DBL and PFL benefits cannot be collected at the same time. This rule applies to any policy for enhanced DBL benefits as well.
- Combined DBL and PFL must not amount to more than the 26-week benefit max during any 52 consecutive calendar weeks (i.e. if an employee has maxed out their 26 week disability leave entitlement, the employee may not take family leave during that same 52 week period).
- As with DBL, successive periods of PFL caused by the same or related injury or sickness will be deemed a single period of family leave only if separated by less than three months.

**How Leave May be Taken.** Leave may be continuous, intermittent, or reduced schedule, in increments of one full day or 1/5 of the weekly benefit.

**Weekly leave.** Any employee taking family leave in weekly increments will be eligible for the maximum number of weeks of leave in any 52 consecutive week period.

**Daily leave.** When any employee takes family leave in daily increments, the employee's maximum period of paid family leave is calculated based on the average number of days worked per week with a maximum of 60 days per year for employees working at least five days per week. Thus, for example, an employee that works three days per week, will receive:

1. On January 1, 2018, the equivalent of three days per week for eight weeks, or a maximum of 24 days in any 52 consecutive week period.
2. On January 1, 2019, the equivalent of three days per week for ten weeks, or a maximum of 30 days in any 52 consecutive week period.
3. On January 1, 2021, the equivalent of three days per week for twelve weeks, or a maximum of 36 days in any 52 consecutive week period.

### Scenario: child born July 2018, parent takes 4 weeks PFL. If the parent takes another 4 weeks PFL in Jan 2019, is it considered the same claim even though separated by more than 6 months?

The rule is successive periods of PFL caused by the same or related injury or sickness will be deemed a single period of family leave only if separated by less than three months. A carrier thus may request that a new PFL claim be filed (12 NYCRR 380-6.1). Whether the higher benefit would apply depends on whether a new claim is required to be filed. It might behoove the claimant to request it be permitted to file a new claim and avail itself of the additional 2 weeks leave (10 week allotment in 2019 and higher benefit amount).

### How is the PFL benefit payment rate determined?

Computing the average daily rate for daily leave.

- When an employee requests family leave in daily increments (e.g. every Monday for six weeks), rather than as a weekly benefit, the daily benefit is calculated based on the employee's average weekly wage divided by the average number of days the employee worked per week. An employee's average weekly wage is computed per 12 NYCRR 355.9 a 2 below.
- In arriving at the average number of days the employee worked per week for the purpose of determining the employee's wage for one day, the employer must average the number of days the employee worked per week over the same eight weeks used in calculating the employee's average weekly wage under 12 NYCRR 355.9 a 2. The average number of days worked may be fractional in order to accurately convert the average weekly wage to an equivalent daily wage.

**12 NYCRR 359 a 2.** An employee's Average Weekly Wage (AWW) is determined by dividing the employee's total wages in the employment of his last covered employer for the eight weeks or portion thereof that the employee was in such employment immediately preceding and including his last day worked prior to the first day of paid family leave OR the employee's total wages in employment the last eight weeks or portion thereof

immediately preceding and excluding the week in which the paid family leave began, whichever is the higher amount, by the number of weeks or portion thereof of such employment. Example: Employee's total wages for prior 8 weeks employment is \$8000. Divide \$16,000/8weeks = \$2000 AWW.

For individual business owners who voluntarily elect PFL coverage, the average weekly wage is determined by computing the individual business owner's total net income in the 52 week period immediately preceding the period of leave and dividing such total wages by 52.

### **If you make less than the average weekly wage, you would get a lesser benefit?**

An employee's paid family leave benefits are capped at the state average weekly wage. For example, effective January 1, 2018, eligible employees may receive up to 50 percent of their average weekly wage during family leave, not to exceed 50 percent of the state average weekly wage (which is \$1,305.92 for 2016). If an employee's average weekly wage is less than \$1,305.92, say \$1,000/week, the employee's PFL benefit would fall below the weekly benefit cap, and the benefit would be \$500/week (50% of \$1,000), subject to a de minimum benefit payment of \$100/week.

The minimum benefit amount payable is the lesser of the percentage of the employee's wage, or \$100.00.

### **A male employee's wife is having a baby in September 2017. With this new mandate will male employees be able to take PFL bonding leave come January?**

Come January 1, 2018, the male employee would be permitted to take PFL bonding leave, as long as the leave is requested, and the period taken is within one year of the birth, and he has met eligibility requirements for NYPFL.

### **Parents at the same employer can take PFL back to back for the birth of child, yes? At the same or different times?**

Yes, but the employer may not allow the employees' leave to be at the same time. An employer is not required to allow more than one employee to use the same period of family leave to care for the same family member or to

bond with a child – newborn or newly adopted/fostered child.

### **If an employee takes leave for bonding with a new born, can they take the leave intermittently, and say they come back part time and take Monday and Friday off?**

Yes, intermittent leave in daily increments is allowable for bonding with a newborn and all NY paid family leave benefits.

### **Is paternity leave covered under PFL?**

Yes, eligible employees who are fathers of a newborn, adopted or foster child can take PFL.

### **Is family leave for pre-adoption time, i.e. travel for an adoption under PFL?**

Yes, as long as the proper documentation is provided at the time of claim.

### **Are employees covered for any self-injuries? What about surgeries or strokes?**

No, family leave is not available to care for an employee's own injury or illness. The leave basis is to provide care for a family member with a serious health condition.

### **Just to clarify, caring for mother-in-law or father-in-law qualifies for PFL? Is there a specification for which family members are covered and which are not?**

PFL provides for leave to care for a "family member" with a serious health condition. "Family member" is limited to spouses, domestic partners, children, parents, parents in-law, grandparents, and grandchildren.

**Child:** means a biological, adopted or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or the person to whom the employee stands in loco parentis.

**Parent:** means a biological, foster or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

**Grandparent:** means a parent of the employee's parent.

**Grandchild:** means a child of the employee's child.

**Domestic Partner:** financial interdependence of the parties is required. Includes both unilateral dependency

and mutual interdependence, which may be evidenced by a nexus of factors, such as common ownership of property, common house holding, shared budgeting or length of relationship.

The registration of a domestic partnership, such as is authorized in New York City, New York City Ad. Code § 3-240 et seq. (1999), would constitute strong evidence of mutual interdependence. The NY WCB has advised that it does not believe that an employee's domestic partner's parents would be covered.

**Siblings are not covered (even if they do not have other family, i.e. spouse or children)?**

Correct. Siblings are not covered under NYPFL. They are not considered a covered "family member" for the employee to take leave to care for.

**Does parent-in-law include the parent of a domestic partner?**

No, per response from the NY WCB.

**What qualifies as a "serious health condition" of a family member?**

A serious health condition is an illness, injury or impairment or physical or mental condition that involves inpatient care in a hospital, hospice or residential health care facility or continuing treatment or continuing supervision by a health care provider and requiring assistance to perform the activities of daily living. Continuing supervision requires a permanent or long term period of incapacity, but active treatment is not required. For detail as to what qualifies as "continuing treatment or continuing supervision", see the definition of Serious Health Condition at 12 NYCRR 355.9).

**Must the employee's ill parent reside in the USA?**

No, an ill parent (or other covered family member) does not need to reside in the US. However, the illness must meet the definition of a serious health condition and leave meet all the requirements of the law. 12 NYCRR Section 380-2.1 states "the employee must be in close and continuing proximity" to the care recipient. This means present at the same location as the family member during the majority of the employment period from which leave has been taken."

**I have several employees that are single and in their late 50's. They have no family. What is the benefit to them?**

Not every employee will have life circumstances upon which the need to take paid family leave is necessary. All covered employees must, nonetheless, pay into the benefit if the employer is taking employee deductions.

**Can employees take paid family leave on an hourly basis?**

No, NY PFL is only available in full day increments. PFL can, however, be taken intermittently, i.e. consecutive days not required, for instance an employee may take two days a week up to the maximum period of days.

**If I need to care for a sick family member who has chemotherapy 2 days a week, can I work 3 days and take 2 days PFL?**

Yes, as long as it's an approved leave and the employee has met the eligibility requirements.

**How will guardian know when the employee is taking intermittent PFL?**

From the claim/leave request form and the employer validation of the leave. PFL benefits may be received on an intermittent basis (less than a full workweek) or in increments of one full day.

**Do you have suggestions on the best way to track intermittent leaves?**

You may consider Guardian's Absence Management Solution Program to assist with the tracking of your employees leaves, amongst many other program services. As with disability, successive periods of family leave caused by the same or related injury or sickness will be deemed a single period of family leave only if separated by less than three months.

**Are PFL benefits calculated on 5 work days, 7 work days or the actual work days an employee works? For example – if an employee works Mon, Tues, Wed each week and takes off each Monday, does she get 1/5 of her weekly pay or 1/3 of her weekly pay?**

If daily increments are taken, the average daily rate is calculated by dividing the AWW by the average number

of days the employee worked per week over the last eight weeks worked (see per 380-2.5(c)(3)).

### **Can an employee have multiple intermittent paid family leave claims at the same time?**

Yes, an employee may potentially need to care for multiple qualified family members but may not exceed the maximum combined benefit in a 52 week period.

### **If benefits are calculated on the actual days worked per week, how is it calculated for employees who work variable work weeks and a different number of days per week? For example, one week they work 3 days, the next week 6 days and the next week back to 3?**

If daily increments are taken, the average daily rate is calculated by dividing the AWW by the average number of days the employee worked per week over the last eight weeks worked (see per 380-2.5(c)(3)).

### **How are time taken and benefits prorated when an employee who works a variable work week schedule for the same number of days per week is out for a partial week? For example, employee works Monday, Tuesday, Thursday, Sat and Sun and is requesting Tues, Thur and Fri for PFL?**

For all employees the time taken is calculated according to 380-2.5(c) depending on whether weekly or daily increments are to be taken. If daily increments are taken, the average daily rate is calculated per 380-2.5(c)(3) by dividing the AWW by the average number of days the employee worked per week over the last eight weeks worked.

### **How are time taken and benefits prorated when an employee who works a variable work week schedule for a variable number of days each week out for a partial week? Do the calculations change if a person is fulltime versus part time?**

For all employees the time taken is calculated according to 380-2.5(c) depending on whether weekly or daily increments are to be taken. If daily increments are taken, the average daily rate is calculated per 380-2.5(c)(3) by dividing the AWW by the average number of days the employee worked per week over the last eight weeks worked.

### **How do PFL benefits work for people who work less than 20 hours per week?**

Benefits are essentially pro-rated based on a 5 day work week. For example, if an employee who normally works 2 days/week has an approved PFL claim for the 8 weeks, she will be entitled to benefits for up to 16 days (8x2), if she works 3 days/week, then she will be entitled up to 24 days (8x3).

### **It's understood an employee who works less than 20 hours per week but works 175 days would be eligible for PFL, but if the employee works 4 days at 6 hours/day or 3 days at 8 hours/day, the employee is working same hours, would the employee still be covered for the 4 days?**

Yes, the WCB regulations does not make a distinction based on the number of hours per day an employee works. While logical to make a distinction, it would be too cumbersome to administer.

### **If an employee currently has child support payment obligations deducted from his/her paycheck, if the employee files for PFL, will child support also be deducted from the PFL benefit?**

Yes, the carrier should deduct child support from the benefit check if notified by the employer.

### **If an employee works for two employers in NYS, who does the employee file with for PFL?**

An employee covered for NYPFL at two jobs will pay deductions at both (unless employer is paying the premium), and the employee can take PFL from both jobs concurrently and earn double the PFL benefit amount, but the employee cannot take PFL from its two jobs at separate times to exceed the PFL benefit period cap each year. For example, the employee may take PFL starting 2/1/18 for 8 weeks and collect their full PFL benefit payment from both employers, or the employee may choose to take PFL with only one of its jobs and work at the other, but the employee cannot take PFL with one employer starting 2/1 for 8 weeks and then with the other starting 6/1 for an additional 8 weeks.

**How will carriers be able to find out if an employee took leave from a previous employer, as the law limits the amount of leave an employee may take within a 52-week period?**

The law permits carriers to coordinate efforts to create an electronic portal in order to file and administer claims for PFL in order to coordinate benefits. While it is unlikely this will be done in the very near future, keep in mind because the 26 continuous weeks or 175 days of work eligibility periods, it will be difficult for an employee to intentionally take leave from one employer, quit, begin work for a second employer, establish eligibility, and then take leave for another qualifying event.

**If an employer provided full salary continuation to an employee for a leave period, can the employer seek reimbursement directly from the carrier? Is this addressed on the claim form?**

Yes, if an employer pays the employee their full salary out of available PTO or an employer leave program, the employer can request reimbursement from the carrier up to the PFL benefit level, e.g. 50% in 2018, 55% in 2019, 60% in 2020, 67% in 2021 and beyond. There is a question on the employer section of the PFL claim form for the employer to request reimbursement. Reimbursement must be requested prior to the PFL benefit being paid by the carrier to the employee.

**How will it be dealt with from a HIPAA stand point? I understand a medical provider's note is needed, but someone may not want others to know of his/ her illness.**

The NY WCB has developed a form called the Release of Personal Health Information Under the Paid Family Leave Law to be completed, signed and returned to the care recipient's (family member's) health care provider. This is an authorization for release of the family member's personal information, the care recipient subject to the authorization rules and exceptions thereto of the HIPAA Privacy Rule (45 C.F.R. parts 160 and 164 [2005]). Like FMLA, without adequate certification from the family member's health care provider, the leave could potentially be denied for lack of proof of a serious health condition.

## Maternity Claims Specifically

**If an employee already took FMLA leave in 2017 for maternity leave can they take PFL in January 2018?**

Yes, as long as the leave is within the first twelve months of the birth of the child.

**An employee will be going out on PFL leave for bonding with their child. Can the employee use their PTO since the amount may be higher than the PFL benefit amount?**

Yes, an employee may elect to use their PTO time in lieu of paid the family leave benefits, but the leave time taken will count toward the maximum leave period allowed.

**If a mother gives birth can she opt to then go on NY PFL day one she gets a higher benefit?**

Yes, PFL can be used instead of DBL after the birth of the child. Remember, an employee may have a covered claim for DBL before the birth of the child (if the mother is disabled by the pregnancy), but not PFL.

**How would the disability kick in first on the birth and then the ny pfl if the child is sick? Can employee collect benefits for both at the same time?**

DBL and PFL benefits cannot be collected at the same time, but they can be collected consecutively. After the birth, an employee can take DBL, which would be typically paid for 6 weeks for a standard delivery and 8 weeks for a C-section. If the child is sick or for bonding, an employee could then take 8 weeks of PFL after the DBL benefits were exhausted.

**Can a mother who gives birth deny statutory DBL and just collect PFL?**

Yes, the mother does not need to make a claim for disability coverage.

**Can the birth mother commence taking NYPFL, even though her physician hasn't released her to return to work yet?**

Yes.

**Are members that have already collected DBL for maternity leave able to utilize this benefit for additional time with their newborn?**

Yes, if the employee has not exceeded the combined DBL/PFL 26 week benefit in a 52 week period.

**Can you walk through how a maternity claim would work when the mother needs to go on bedrest? Would they take DBL for the bedrest and postpartum period, then any additional time beyond the 6/8 weeks postpartum as PFL?**

Periods of disability prior to the mother giving birth would be covered under NYDBL, which would include periods of bed rest. Once she has given birth she has two options:

- a. Continue her DBL through her 6-8 weeks of her disability recovery (6 weeks for a standard delivery and 8 weeks for a C-section), which may run concurrent with FMLA as well, and, once her disability has ended, she can then transition onto PFL for the full 8 weeks, which must be taken within the first 12 months of the birth.
- b. Once she has given birth she can discontinue DBL and transition onto PFL for the full 8 weeks.

**If a covered employee had a baby on 1/7/2017, would she only be eligible for one week of leave in 2018? Or the entire 8 weeks?**

PFL leave for bonding with a newborn child is required to be taken within the first 12 months of the birth. Since the baby was born 1/7/17, the 12 month period during which the leave could be taken would expire 1/7/2018. The employee would at most be entitled to PFL bonding leave from 1/1/18–1/6/18.

**How does it work if an employer employs multiple members of the same family?**

An employer is not required to allow more than one employee to use the same period of family leave to care of the same family member.

## PFL and FMLA

**Can an employee take NYPFL and FMLA at the same time? Can PFL time be designated to run with FMLA?**

Yes, NY Paid Family Leave can be taken by employees who are eligible for time off under the provisions of the FMLA. NY PFL must run concurrently with an employee's FMLA leave when the reason qualifies under both PFL and FMLA, unless an employer chooses to permit otherwise. Eligible employees must then apply for both NYPFL and FMLA. If an employee is eligible for leave under both the federal FMLA and NY PFL, but the employee declines to apply for PFL payments, employers may still designate the leave as both FMLA and PFL (12 NYCRR 380-2.5(g)).

FMLA & NYPFL – some different qualifying reasons: There are some covered reasons for NYPFL which are not considered for FMLA, for example, leave for a parent-in-law or domestic partner. In cases where the employee may not be entitled to FMLA because the leave is not a qualified reason under the FMLA, it could not be designated as FMLA.

Guardian provides the below rules, albeit technical, to provide employers guidance:

In the event that a period of family leave benefits received by an eligible employee is concurrently designated as leave under FMLA, by an employer subject to FMLA, the employer must notify the eligible employee of such designation and must also provide the employee with certain required notice by sections 29 CFR 825.301 and 825.305.

1. If an employer fails to provide the notice required, the employer will be deemed to have permitted the employee to receive family leave benefits without concurrently using the benefits available under FMLA (WCL§206 4).
2. If an employer designates a period of family leave to be covered by the FMLA for a reason also covered under NYPFL (WCL §201(15)), and if the employer informs the employee of their eligibility for NYPFL and the employee declines to apply for NYPFL benefits, the employer and its insurance carrier may count the leave against the employee's maximum duration of NY PFL in a 52-week period.

3. FMLA designated leave taken by an employee due to his or her own serious health condition is not family leave and does not reduce the amount of paid family leave an employee is eligible for.
4. The 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 paid family. When the total hours taken for FMLA in less than full day increments reaches the number of hours in an employee's usual work day, the employer may deduct one day of paid family leave benefits from an employee's annual available family leave benefit. The employer is not entitled to reimbursement from its carrier for such paid FMLA hours.

#### **How does FMLA and NY PFL work with a birth of a child when they would run concurrently, and FMLA allows the employer require the employee use PTO and NY PFL doesn't?**

The use of paid time off accruals during family leave by an employee of an FMLA covered employer is governed by the FMLA. An employer covered by the FMLA (29 U.S. Code Chapter 28) that designates a concurrent period of family leave under may charge an employee's accrued paid time off in accordance with the provisions of the FMLA to top up the employee's PFL benefit. Therefore, as of 1/1/18, an employee is entitled to a 50% PFL benefit up to the statewide average weekly wage (\$652.96). If the absence is FMLA concurrent with NYPFL, the employer could require the employee the employee to use accrued and available PTO to top up the NYPFL benefit so that the employee receives 100% pay during leave, however the employers FMLA policy must indicate this requirement. But note, other than when the FMLA claims runs concurrently with the NY PFL claim, an employer cannot compel an employee to use their available PTO in lieu of filing for NY PFL benefits. Rather, the employer must give the employee the choice (option) to use PTO or NY PFL, and, regardless of whether the employee chooses to use PTO, the employee is only entitled to 8 weeks of NY PFL (in 2018); therefore, the time used and paid for through PTO would count against the employee's 8-week benefit.

#### **What happens if the employee already exhausted FMLA?**

Typically, NY PFL and FMLA will run concurrently. However, if the employee has already exhausted their FMLA entitlements as of 1/1/18, the employee would still be entitled to their full NY PFL entitlement effective 1/1/2018.

#### **Can an employee who qualifies for a 60 day FMLA take that leave first followed by NY PFL? I assume one can take a NY PFL and not FMLA if qualified for both?**

Typically, FMLA and NY PFL will run concurrently if the leave reasons allow. However, if the reason for taking FMLA leave is not a covered reason for NY PFL, then in these cases, yes, the employee could potentially take FMLA leave prior to a NY PFL event. For example, a pregnant employee cannot begin her NY PFL until the birth of the baby, so she can take NY PFL after she used her FMLA allotment.

#### **Birth of a child – mother is covered for DBL for 8 weeks (c-section). Then, mother chooses to take PFL for 8 weeks after that. Mother is out for 16 weeks – this exceeds 12 weeks of FMLA. That means employers in NYS will be required to allow employees to be absent beyond what FMLA requires?**

Yes, that is correct. In the example described, the employee would be entitled to 16 weeks of benefits and job protection.

#### **Does FMLA and PFL for the birth or adoption of a child have to be continuous? In other words, can an employee take 4 weeks FMLA come back to work then take 8 weeks PFL?**

NY PFL allows employees to take intermittent bonding in a minimum of one-day increments with a newborn child or newly adopted child or child placed by foster care with the employee. Unlike FMLA, it is not at the employer's discretion to disallow PFL permitted intermittent bonding.

**How does PFL work with FMLA if the employer uses a different period for calculation of eligibility (for example, if the employer gives FMLA on a calendar year basis)?**

The two leave entitlements would be managed separately as it relates to their individual calculation methods. Note, there are provisions in the Federal FMLA for multi-state employers to have a different FMLA calculation method where the current chosen method conflicts with a method required for state leave (FMLA § 825.200 d(2) Amount of leave). It is recommended you consult with your legal counsel as to whether this provision would benefit you based on your current leave policies.

Depending on the employer's FMLA leave policy, the FMLA and NYPFL periods may not line up directly.

Depending on the employer's established FMLA policy for bonding and care this can be based on:

1. Calendar year; (2) Any fixed 12 months; (3) 12-month period measured forward from the first day of care; (4) A rolling 12-month period measured backward from the first day of care.
2. FMLA- in increments as small as 15 mins in a 12-month period\*

Whereas for NYPFL – leave is taken in a consecutive 52-week period measured from the first day of leave. For military caregiver leave, the 12-month period always begins on the first day the employee takes leave.

**\*FMLA fifteen-minute intervals**

The 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 paid family leave (WCL §206 (d)(3)). When the total hours taken for FMLA in less than full day increments reach the number of hours in an employee's usual work day, the employer may deduct one day of NY PFL benefits from an employee's annual available family leave benefit. The employer is not entitled to reimbursement from its carrier for such paid FMLA hours (12 NYCRR 380-2.5).

**If an employee is taking intermittent FMLA to care for an elderly parent, does the employee have to recertify to apply for NY PFL?**

The employee must provide a certification for the NY PFL leave request. Employers cannot require the employee to recertify for FMLA outside of the recertification period as allowed under the FMLA regulation.

**If an employee is eligible for FMLA e.g. birth, can they elect not to complete the PFL paperwork? Basically, could the employee go out under FMLA and use their 12 weeks and then elect to take PFL after they have used up their benefits through FMLA?**

If an employer designates a period of leave to be covered by the FMLA for a reason which the employee is also eligible to NY PFL, and the employee declines to apply for payment under NY PFL, the employer may count the FMLA period against the employee's maximum NY PFL leave in a 52 consecutive week period provided notice is given to the employee.

**How does FMLA and NY PFL work with a birth of a child when they would run concurrently and FMLA allows the requirement of PTO and NY PFL doesn't?**

The use of paid time off accruals during family leave by an employee of an FMLA covered employer is governed by the FMLA. 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.

**What are examples of situations where an employee may be protected by NY PFL but not by FMLA (assuming employer is subject to FMLA)?**

There are different eligibility criteria between FMLA and NY PFL, which would need to be determined independently of each other, as well as different covered reasons for leave (see chart provided). Example – under FMLA, family member does not include parent-in-law, domestic partner, grandparent or grandchild, but does under NYPFL. The definition of a child was expanded by the DOL to include caring for the child of a domestic partner (in loco parentis relationships).

### **Is FMLA now irrelevant?**

No, there are different reasons for leave covered by FMLA which are not covered by NY PFL and vice versa. There are also separate eligibility criteria as well for each benefit therefore one does not negate the other.

### **How far back does a former employee's FMLA eligibility go? For example, an employee worked for an employer 1 year ago and was recently rehired and three months later the employee asks to take FMLA?**

To be FMLA eligible, there are three eligibility requirements which need to be met.

#### **The FMLA definition of an eligible employee:**

1. The employee has been employed by the employer for at least 12 months and does not need to be consecutive months provided breaks in services do not go beyond seven years. Employee's break in service which is because of the employee's fulfillment of his or her Military (USERRA) obligations, counts in determining whether the employee has been employed for at least 12 months by the employer, and
2. The employee has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
3. The employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Let's assume the employee works at a worksite with 50 or more employees within 75 miles. If the employee worked for the employer for 1 year, left and was subsequently rehired within 7 years of the original date of hire, they have met the one year of service eligibility requirement. The second test for eligibility would be the employee needs to have worked 1250 hours in the past 12 months prior to taking leave, which they may not have met if requesting leave 3 months after rehiring. The employer should calculate hours worked in the past 12 months and appropriately designate the employees FMLA leave request according to the eligibility determination made.

### **Can one form be used to eligibility and rule for both FMLA and NYPFL?**

Yes, the employer could provide the eligibility determination in one notice to the employee for both FMLA and NYPFL; however, the employer must make independent eligibility determinations under each regulation as there are differences in eligibility and some differences in covered reasons for leave.

## **PFL and Other Employer Sponsored Leaves/Coverage (STD/PTO)**

### **Are employers required to or can they submit their company leave policies to the NY WCB for approval in lieu of providing NYPFL?**

No. Per NY WCB feedback Guardian received 11/30/17, even if an employer would like to submit a plan to the WCB for approval, the plan would still need to be supported by a private insurance policy or be self-insured. Insurance carriers would not be approving these plans in any way. The WCB would be approving it in addition to the plan being at least as favorable, the employer showed proof of coverage from carrier or self-funded.

### **If FMLA and NY PFL are running concurrently, can you require the employee to use PTO?**

An employer covered by the FMLA that designates a concurrent period of family leave under NY's Paid Family Leave law may charge an employee's accrued paid time off in accordance with the provisions of the FMLA. But note, other than when the FMLA claims runs concurrently with the NY PFL claim, an employer cannot compel an employee to use their available PTO in lieu of collecting NY PFL benefit payments. Rather, the employer must give the employee the choice (option) to use PTO or NY PFL, and, regardless of whether the employee chooses to use PTO, the employee is only entitled to 8 weeks of NY PFL (in 2018); therefore, the time used and paid for through PTO would count against the employee's 8-week benefit.

- If employee chooses to use its PTO to receive full salary while out of PFL leave, the employee cannot collect PFL benefit payments until the PTO is exhausted. An employee cannot collect more than his full salary (WCL 206 3). The employer may seek reimbursement of the PFL benefit amount (50% AWW in 2018) by seeking reimbursement on the PFL-1 claim form, prior to the carrier paying the benefit to the employee.
- If the employee does not choose to use its PTO to receive full salary while out on PFL leave, the employee would be paid the PFL benefit by the carrier.

### **Can an employer be reimbursed through PFL insurance benefits? (WCL §237)**

Yes, an employer may be reimbursed by the PFL carrier where:

1. the employee elects to use unused vacation or PTO to receive full pay;
2. the employer has a full wage-replacement plan, or
3. the employer has made advanced payment of the PFL benefits to the employee.

**Important note:** Carriers are currently seeking clarification if the law would permit employers to be reimbursed to wage replacement less than 100% of the employee's salary, e.g. 80% salary replacement – can employer seek reimbursement of the additional 30% salary paid (80% - 50% PFL benefit in 2018)? If they cannot, as is the current WCB position, then any employee may receive more than 100% pay, e.g. employee receives 80% employer salary continuation. Since this is less than full-wage replacement (100% wages), the employer cannot seek reimbursement for the PFL benefit amount, so the employee would receive the 80% employer pay and its full PFL benefit payments.

### **Supplementing NYPFL with accrued time (“topping up” the NYPFL benefit):**

An employer can make voluntary payments to an employee equal to the balance of an employee's salary, or allow an employee to use part-day accrued leave equal to the balance. (WCL 205 (3)(c), WCL 205(2)(c)). Guardian

recommends employers indicate whether they will or will not allow “topping up” in their company leave policies.

### **When can't an employer be reimbursed through PFL insurance benefits?**

An employer is unable to be reimbursed by the PFL carrier if the wage replacement benefits paid to the employee were paid through a supplemental insurance policy, e.g. STD, obtained by the employer.

Why? An employer is unable to be reimbursed because the employer was not paying the benefits to the employee; rather, the benefits were paid by a separate insurance carrier.

Therefore, reimbursement in this situation would unjustly enrich the employer who made no out-of-pocket expenses (other than payment of premium) toward the employee's family leave.

### **If an employee would like to supplement their pay on PFL by using their PTO to cover the difference, is an employer required to do this? Must employees use paid time off first before PFL kicks in or can they use PFL and save PTO? If the employee opts to use their PTO, would the NY PFL time start being tracked at the beginning of the PTO time or after the PTO runs out?**

An employee may choose, but cannot be required, to use accrued and available vacation or other paid time off to receive a full salary while on family leave (in lieu of the paid family leave benefit). The employer must give the employee the choice (option) to use accrued PTO or receive the NY PFL benefit payments. An employer that pays the full salary during the period of family leave may seek reimbursement from its PFL carrier for the amounts paid. If the employer does so, this time during which the employee takes vacation, PTO, or other personal leave at full salary will count against the NY PFL period allotment. The employee would be entitled to all PFL protections – job, non-discrimination, and health insurance.

### **Can an employee use a full day PTO and collect 50% of their salary through PFL for the same day?**

No. An employer could request reimbursement from their PFL carrier for any amount they have paid the employee for time off that counts toward the PFL leave benefit period up to the maximum benefit amount

allowed by NY PFL. The employee would have no claim directly to the carrier for additional monies. Employers should closely monitor employee requests with the carrier if they are currently paying the employee with PTO.

#### **Does PTO accrue while employees are out on PFL?**

It is not required that PTO be accrued while an employee is on PFL leave, but employers may opt to allow accrual. Guardian recommends employers address this in their PFL employee written notice, e.g. handbook.

#### **If an employee uses their PTO, should they wait to apply for PFL until after PTO is used?**

No, the employee should submit their request for PFL leave. This time should be counted against the employee's PFL leave period allotment, unless the employee permits otherwise and does not seek reimbursement of the PFL amount based on their payment of full salary to the employee for the period. If its not being counted toward the PFL leave period allotment, then the leave date should be following the employee's use of their accrued PTO time. Employers should closely monitor employee requests with the carrier if they are currently paying the employee with PTO.

#### **If our already established company policy is more comprehensive than the NY state policy and offers better benefits, will a company be required to provide PFL coverage (coverage w/a carrier or self-insured)?**

Covered employers are still required to have PFL coverage. We recommend that employers review all of their existing leave policies to see what impact NY PFL will have and amend their leave policies accordingly to consider accommodating the guidance above regarding FMLA (if the employer is subject); PTO; salary continuation and/or other leave policies. Per NY WCB feedback Guardian received 11/30/17, even if an employer would like to submit their company leave policy including paid family leave to the WCB for approval, the plan would still need to be supported by a private insurance policy or be self-insured. Insurance carriers would not be approving these plans in any way. The WCB would be approving it addition to the plan being at least

as favorable, the employer showed proof of coverage from carrier or self-funded.

#### **Employer has a generous paid parental leave policy (4 weeks @ 100% with 60% for next 4 weeks). Will employer be reimbursed up to PFL maximum if employee is 100% protected?**

Yes, the employer could request reimbursement from their PFL carrier for any amount they have paid the employee for time off that counts toward the PFL leave benefit period up to the maximum benefit amount allowed by NY PFL.

#### **An employer provided full salary continuation to an employee for a leave period, can the employer seek reimbursement directly from the carrier? Is this addressed on the claim form?**

Yes, if an employer pays the employee their full salary (100% salary) out of an employer leave program, the employer can request reimbursement from the carrier up to the PFL benefit level, e.g. 50% in 2018, 55% in 2019, 60% in 2020, 67% in 2021 and beyond. There will be a question to this effect on the Leave Request Form from the State.

Pending question with NY WCB if an employer can seek reimbursement for salary continuation that is less than the employee's full salary, say 80% (seeking difference between 80% and 50% of AWW).

#### **Can an employer reduce the pay it is giving under a 6-week maternity by the amount of the NYPFL benefit payments?**

Yes. The employer could revise its leave policy to state this and that its maternity leave will run concurrently with PFL.

#### **If employer leave policy allows 4 weeks, can the employee take leave for 12 weeks with PFL in 2018?**

Yes, unless employer revises its leave policy to accommodate for NYPFL so that the employer's leave period runs concurrently with NYPFL.

#### **Can an employee request NY PFL after the STD benefit period ends? Company leave ends?**

Yes. Carriers raised with the NY Workers Compensation Board the anticipated employer concern of an employee

being able to receive time off in excess of the maximum 26 weeks combined DBL/PFL leave within a 52-week period, resulting from an employer's separate coverage under an employer STD policy or other employer-sponsored leave program. The NY Workers' Compensation Board advised that with respect to STD insurance, employers would need to examine this concern, whether anything can be done to address it, with their insurance carriers. For instance, there was discussion that carriers may need to re-file their STD forms nationwide to include an offset for PFL (if permissible). And, with respect to employer leave policies, employers may revise their leave policies to address integration with NYPFL, in accordance with the rules governing NYPFL.

#### **Can NY DBL and STD be deducted from the PFL benefit amount? Can an employee take NYPFL when out on STD?**

- NY DBL and NY PFL are separate benefits for separate claims, they may not be claimed at the same time; and thus, PFL cannot be reduced by a DBL benefit payment.
- STD is wage replacement benefits paid to the employee through a supplemental insurance policy obtained by the employer or self-funded. NY Workers' Compensation Law speaks only to reimbursement of an employer for employer insurance benefits such as STD. An employer is unable to be reimbursed by the PFL carrier for PFL benefits otherwise due to the employee because the employer is not paying the benefits to the employee; rather, the benefits were paid by a separate insurance policy. Reimbursement in this situation would unjustly enrich the employer who made no out-of-pocket expenses (other than possibly payment of premium) toward the employee's family leave (NY WCL §237). The WCB advised, however, that employers and their carriers could examine their STD policies to determine if any provision or amendment thereto may allow for the STD benefit to be reduced by the PFL benefit amount.

- Yes, an employee can take NYPFL leave while out on STD, and NYPFL benefits can be paid during any STD waiting period.

#### **How is NY PFL impacted by NYC earned sick time act (ESTA)?**

The revised regulations remain silent on the interplay between PFL and the New York City Earned Sick Time Act ("ESTA"), which provides up to 40 hours of sick leave, at full pay, to certain New York City employees. Despite our questions as to whether ESTA time may run concurrently when leave is taken for a PFL qualifying reason, the Board has not addressed this potential issue in the revised regulations.

Absent further clarification from the Board, employers covered by ESTA should assume that eligible employees are entitled to any applicable ESTA time as well as PFL, and that such time may not run concurrently.

## **Employee Protections – Job Protection, Non-Discrimination, Health Insurance Continuation**

#### **Does job protection work similarly to FMLA for employers with over 50 employees?**

Yes, NY Paid Family Leave Law requires an employer to reinstate an employee returning from PFL to his or her prior position of employment (or to a comparable position with comparable pay, benefits, and other terms and conditions of employment). Similar to this "same or comparable position" requirement, and FMLA requires the employee be reinstated to the "same or equivalent position". An employee may also not lose any benefits accrued during employment prior to taking family leave.

#### **What happens if an employee isn't reinstated to the same or comparable position?**

The employee may report that employer to NY State. The employer then has 30 days to either take corrective action or file a formal response to the employee.

### **Does an employer have to maintain an employee's health insurance while out on PFL?**

An employer must maintain an employee's group health plan benefits for the duration of paid family leave as if the employee had continued to work. If an employer provides a new health plan or benefits, or changes health plans or benefits while an employee is on paid family leave, the employee is entitled to the new or changed plan or benefits. The employee must continue to make any normal contributions to the cost of the health insurance premiums.

### **Can premiums for health insurance be deducted from PFL benefits?**

Based on the following WCB feedback, Guardian will not deduct insurance premiums from PFL benefits. NY Workers Compensation Law provides only that an employer must continue to provide health insurance while an employee is out on PFL (Sec 203-c). Neither the statute nor the regulations (Sec 380-7.3) prescribe how health insurance premiums should be collected, nor does the law state a carrier can deduct premiums for health insurance from the PFL payment.

### **If a company pays 100% of health insurance, and an employee goes out on PFL, is the employer required to continue to pay 100% of health insurance premiums or can the ask the employee to cover part of the cost?**

If the employer is paying 100% of the health insurance premiums prior to an employee taking PFL, the employer is required to continue paying 100% of the premiums while the employee is out on PFL.

### **You stated that the medical can be "suspended" while out and be reinstated upon return. Does the employee have to pay for coverage arrears for while they were out?**

Employees would not pay back premium for a period of time on family leave, for which the employee opted not to pay its insurance premiums. Premiums would commence when the employee (and its dependents) rejoined the plan.

### **If an employee does not pay their premium while out and the coverage is dropped, can they re-enroll once they return?**

Yes, if health insurance coverage lapses because an employee has not made the required premium payments, upon the employee's return from paid family leave, the employer must restore the employee to coverage/benefits equivalent to those the employee would have had if paid family leave had not been taken and premium payment(s) had not been missed, including family or dependent coverage. (Aside – for a fully insured health insurance plan, this will likely require an amendment to NY insurance law mandating compliant policy provisions and, arguably, would be unenforceable as preempted by ERISA for a self-insured health insurance plan).

### **What other protections are there for employees who take paid family leave?**

An employer may not retaliate or discriminate in any way against employees for taking Paid Family Leave.

### **How does an employee file a complaint regarding discrimination, e.g. not restored to job?**

Form PFL-271S (11-17) Statement of Rights for Paid Family Leave provides these instructions:

If your employer terminates your employment, reduces your pay and/or benefits, or disciplines you in any way as a result of you taking or asking about Paid Family Leave, you may request to be reinstated by taking these steps:

1. Complete the Formal Request for Reinstatement Regarding Paid Family Leave form (PFL-DC-119)
2. Send your completed form to your employer and a copy of the completed form to: Paid Family Leave, P.O. Box 9030, Endicott, NY 13761-9030
3. If your employer does not reinstate you within 30 days, you may file a discrimination complaint with the Worker's Compensation Board using form PFL-DC-120, available at <http://www.ny.gov/PaidFamilyLeave>. The Worker's Compensation Board will assemble your case and schedule a hearing.

## Policy Language/Employee Poster/Other Employer Notices

### Will Guardian provide the required claim and certification forms once available?

Yes, the PFL claims form, instructions, and all related forms (i.e. medical authorization release) will be on our PFL- dedicated Guardian Anytime page ([www.guardiananytime.com/NY-paid-leave](http://www.guardiananytime.com/NY-paid-leave)).

### Do employers have additional notice obligations to its employees? (handbook, poster)

Written Guidance about PFL in Employee Handbook or other Documentation: Employers must provide written guidance to all employees regarding their rights and obligations under the PFL, including how to file a claim for PFL, in their employee handbook describing employee benefits and leave provisions if they maintain one or in other written documentation.

Guardian recommends employee materials be created or revised to address the following:

- The name of your Paid Family Leave insurance carrier or if you are self-insuring for coverage.
- Instructions on how to request Paid Family Leave.
- Whether you, as the employer, are subsidizing all or part of the cost of your employees' PFL premiums.
- Continuation of Health Insurance. Employees' responsibility for covering premiums while out on leave if it's an employee contributory plan.
- Whether you permit employees to use accrued time to supplement Paid Family Leave benefits, e.g. explain employees have the option to use PTO time to receive full salary and not collect PFL insurance payments (but must file PFL claim and the PTO time counts against the PFL period allotment) and whether employer is offering option to top up PFL payments (when PFL benefit is 50% AWW, employer pay the difference up to employees' full pay).
- Whether Paid Family Leave must be taken concurrently with any other type of leave (e.g., FMLA, maternity leave) if the claim is eligible for

both and require the employee to file its PFL claim. This will enable the employer to track the leave periods.

- Indicate whether they will or will not allow "topping up" in their company leave policies. An employer can make voluntary payments to an employee equal to the balance of an employee's salary, or allow an employee to use part-day accrued leave equal to the balance. (WCL 205 (3)(c), WCL 205(2)(c)).
- If employer is subject to FMLA, advise if NYPFL will run concurrently with FMLA for qualifying leaves, and whether PTO time will be used to pay full salary while on leave with the PTO time reducing the PFL period allotment.
- Accrual of leave time. While on NYPFL, employees will/will not continue to accrue sick or vacation time.

### Sources for Employee Notice Materials

Guardian has created a NYPFL Employee Fact Sheet and a DBL-PFL Summary Page, available on our Guardian Anytime site, which employers may access and use as they see fit.

More Resources at <https://www.ny.gov/new-york-state-paid-family-leave/paid-family-leave-information-employers:Model-Language-for-Employee-Materials>

### Employee Fact Sheet Business Own Fact Sheet

**Written notice:** Employers must provide employees who take eight or more consecutive days of family leave with a written notice of their rights under the new law (Employee Statement of Rights (PFL-271s)). The statement shall be provided to the employee within five business days after the employee's seventh consecutive day of absence due to family leave or within five business days after the employer has received notice that the employee's absence is due to family leave, whichever is later. Same is required for DBL -- whenever an employee is absent from work due to disability for more than seven consecutive days, the employer must within five days thereafter provide the employee with prescribed Form DB-271S).

### Posting the NY PFL POSTER – NOTICE of COMPLIANCE

(PFL-120): Employers will be required to conspicuously post and keep posted the PFL Notice of Compliance

poster in the workplace to indicate their compliance with the PFL requirements.

### **Is there a template of the “poster” for the posting requirement?**

The PFL-120 Notice of Compliance poster was published mid-November 2017 Guardian is completing it with policyholder information and mailing it mid-December.

### **Employer review its FMLA & other leave policies**

Covered employers should review their existing paid time off, leaves of absence and family and medical leave, including FMLA, policies. These policies likely need to be revised to comply with or at least coordinate with NY PFL. Even if an employer’s company leave policy is equal or more generous than NYPFL benefit, covered employers are still required to have PFL coverage.

REVIEW COLLECTIVE BARGAINING AGREEMENTS COVERING NY EMPLOYEES – MUST BE “AT LEAST AS FAVORABLE” AS NY PAID FAMILY LEAVE IN THE PRIVATE SECTOR or IF THE PUBLIC EMPLOYER IS OPTING-IN FOR NYPFL.

### **Plan for employee absences from work**

This may vary from employer to employer and based on the employee’s particular position. We simply advise you to do whatever planning you can to avoid staffing gaps. This may mean cross-training your team in different roles or looking into short-term staffing solutions from temporary agencies.

### **Absence management**

Train Human Resources and others to properly track time off to demonstrate compliance with the NYPFL.

Start considering what will be your process to keep track of NYPFL, especially as NYPFL allows for leave in daily increments at intermittent intervals (i.e. every Wed).

Absence management may become more complex. This may be overwhelming for employers who are not subject to FMLA, as FMLA already requires granular absence management capabilities.

## **Miscellaneous**

### **Will Guardian notify existing DBL groups of impending PFL law?**

Yes. We’re notifying existing DBL groups of PFL via webinars, emails, direct mailings and through our broker partners.

### **What happens if all carriers lose money?**

Impossible to say at this point. As of right now, Guardian’s focus is on being able to properly administer PFL as of 1/1/18 and service our customers coverage needs to the best of our ability. The paid family leave legislation anticipates that an economic downturn may affect the economic feasibility of implementing the law and allows the Superintendent of the NY Department of Financial Services to delay the scheduled increases in the paid leave benefits based upon several factors, including the current cost to employees of the paid leave benefits (because the benefits are financed by deductions from their pay), the availability of insurance policies providing paid leave benefits, and the impact of the benefit increase on employers’ businesses.

### **Do other states have paid family leave?**

New York will now join California, New Jersey, Rhode Island and Washington are the only states in the nation that provide a Paid Family Leave benefit. A few others are, however, considering passing similar laws. When fully implemented, New York will have the longest and most comprehensive Paid Family Leave program in the nation.

### **Is New York increasing the DBL coverage amount from \$170 a week? The maximum benefit for NYDBL is well below the poverty level and hasn't been updated in years. Are you aware of any pending changes to DBL benefits in light of the addition of PFL?**

Carriers have been advised by the NY Department of Financial Services that there is no current plan to increase the weekly DBL benefit, despite the clear likelihood a mother would make a claim for the higher PFL benefit following the birth of a child.

For more information, you can visit the state of New York’s Paid



Family Leave website at [www.ny.gov/paidfamilyleave](http://www.ny.gov/paidfamilyleave).

The information presented on this site is a general overview of New York's Paid Family Leave law and its implementing regulations and is not intended to serve, nor should it be used, as legal advice.

Materials will be periodically updated to remain current. Planholders/employers are advised to consult with appropriate legal and tax counsel to determine the impact on their business and their compliance responsibilities. In the event of any conflict between the information on this site and the relevant insurance policy and NY Law and Regulations, the policy and NY Law and Regulations shall control.