NY's Paid Family Leave Program

What Employers Need to Know

By Sharon P. Stiller and Rachel Demarest Gold

Effective Jan. 1, 2018, New York State will have its own "Paid Family Leave Benefits Law." On July 19, the state finalized regulations pursuant to the new law, which covers employers that have one or more employees for 30 or more days in a calendar year. Since the payroll deductions supporting the Law began July 1, 2017, it is not too early to begin reviewing your employer obligations.

The law covers all employees — including domestic and private — though their eligibility kicks in only if they are employed for 40 or more hours per week and on each of at least 30 days in the calendar year. While no employee may waive this coverage, ineligible employees must be given a waiver of benefits form as an option to avoid the payroll deduction.

Differences from the FMLA

The law is similar to the federal Family and Medical Leave Act, except: 1) it applies to smaller employers; 2) employees ineligible for federal FMLA because of length of service may be eligible for State leave; 3) a portion of employee's wages are paid; and 4) the reasons for taking the leave are to care for a family member, not oneself. These differences are significant, because most employers will be covered even if they are not covered by the federal FMLA, and more employees will be eligible. The new paid family leave is available to employees who are qualified as discussed above, and who need the leave to bond with a new child (as distinguished from maternity leave/disability due to the health of the birth mother, which CAN be used consecutively), to care for a loved one with a serious health condition, or to help relieve family pressures when someone is called to active military service.

All insurance carriers who offer disability insurance are now required by New York State to offer the new paid family leave policy. All costs of the policy, however, are to be borne by the employee and are to be collected through a payroll deduction that was finalized by the State Department of Financial Services (DFS) in June. DFS set the maximum employee contribution rate of up to 0.126% of the State Average Weekly Wage, currently $1,305.92, which equates to a maximum employee contribution/deduction of $1.65 per week. The maximum contribution will adjust as the State Average Weekly Wage changes. It is worth noting that tipped workers' base salary will be determined by adding the tips into their wages.

Insurance Considerations

Payroll deductions were authorized to begin July 1. While not mandatory, initiating payroll deductions now is the recommended course of action. The policies will be billed by your carrier with your disability policy and payment will be due up front as it is for comparable employee disability policies. That means that if you do not begin deductions now, you will be fronting the cost of the benefit in January when in fact the law explicitly places the cost of the leave policy on your employees.

Employers should contact their disability carrier to assure that they have the required policy, and also their payroll service to make sure the employee deductions are accurate and timely. It is worth noting that several carriers are still developing their policy offerings under the new law. While your carrier may not have the policy in place yet, you may nonetheless begin deductions so long as you keep the deducted funds designated specifically for the policy cost purpose. If you operate under a collective bargaining agreement, please speak with your union, as what is permissible may conflict with the new law.

Amending Your Employee Handbook

In addition to these preliminary mechanics of the new law, a written policy in your employee handbook is generally required, so it is not too soon for you to begin working on them. Some of the basic provisions that should be part of that policy include:

- Employees who work 20 or more hours a week become eligible for the paid leave after 26 consecutive weeks of work, regardless of the number of days worked per week. Employees working less than 20 hours a week become eligible after working 175 days. Once an employee becomes eligible, there is no waiting period for benefits.
- In January 2018, the benefit is 50% of the employee's weekly pay, capped at the State Average Weekly Wage, and then increasing incrementally to 67% by 2021.
- In January 2018, the benefit will be 8 weeks, increasing incrementally to 12 weeks by 2021.Leave is permissible to care for a family member in close and continuing proximity with a serious health condition (including a child, parent, grandparent, grandchild, spouse or domestic partner); to bond with a child as a result of birth, adoption or fostering; or for any qualifying exigency relating to a spouse, domestic partner, child or parent who is serving on active military duty.

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- If the basis for Paid Family Leave overlaps with an FMLA basis, employers may designate the leave as concurrent.
- Eligible employees may take intermittent leave and receive paid benefits in increments as low as one full day.
- Birth mothers who qualify for disability may also take paid family leave, but they cannot collect payments from both at the same time in the post-partum period.
- Part-time employees will be eligible to receive a pro-rata portion of Paid Family Leave.
- Seasonal workers, hired for less than 12 weeks, may waive coverage and therefore the deduction, but all employees who may waive under the law MUST nonetheless be given the waiver form and be allowed to make the choice at that point.
- Eligible employees will be required to provide at least 30 days' notice of foreseeable leave.
- Medical certification is required for family leave, but a birth certificate or adoption papers are sufficient for bonding leave.
- Employee health insurance is protected during leave so long as the employee pays the employee portion of coverage; if it lapses, the employer must nevertheless restore the employee to coverage when the employee returns to work.
- Employers are explicitly prohibited from discriminating against employees for taking this leave, which means that they must be guaranteed job protection as well as the continuation of health insurance while on leave.

If you do not have a handbook, you will be required to provide notice to employees of their rights and obligations, including how to file a Paid Family Leave claim. There will also be a posting requirement that will be issued by the State Labor Department, but this has not yet been finalized. In addition, to request Paid Family Leave, employees will generally be required to complete a Request for Paid Family Leave or PFL-1 form developed by the State, although alternative forms containing the same information are permissible. The Workers' Compensation Board, which is charged with the implementation and execution of the new law, will be issuing a form notification for employees and a model application and approval form for the leave, with instructions.

Coordinating with the FMLA

If you are covered by the federal FMLA, you may want to start working out how to integrate that coverage with the new paid family leave program. You will also need to determine how to implement it in conjunction with any other paid or unpaid leave policies you already have in place. In fact, employers may offer employees the option of charging all or part of the paid family leave to existing paid leave programs so that they can receive their full wages. If you do this, you can request reimbursement for the paid family leave benefit from your insurance carrier.

You may want to start working out how to integrate coverage with the new ... program.

This leads to the question of how an employer is supposed to analyze what legal provisions govern a given situation with an employee: What are an employer's obligations once an employee identifies a need for leave, and what questions must be answered to determine the answer?

First, is the employee asking for leave as the result of a condition that they themselves are suffering? Or is it because they have a family member in need of care and attention? If the leave is for the employee's own condition, then Workers' Compensation, Disability, and possibly the FMLA, will apply. If the leave is to care for a member of the employee's family, then the State Paid Family Leave and possibly the FMLA will apply. The exception to this is giving birth to one's child, where the leave is both for the mother's condition following childbirth as well as to care for and bond with the newborn child, as discussed below.

Second, what is the incident that precipitated the need for leave? If it is an employee injury incurred on the job, the State Workers' Compensation Law applies. If it is an employee injury as the result of something that did not occur in the course of employment, then the state Disability Law applies in the first instance, followed by the FMLA and possibly the Americans with Disabilities Act. Please note that in New York City there is also paid leave required for an employee's own care, which has its own scope and requirements.

Third, is the employee eligible under each of the applicable laws? An employee is not eligible under FMLA until they have worked for you for at least 12 months and 1250 hours during the preceding 12 months. State Paid Family Leave, however, kicks in after 26 weeks for a full-time employee and 175 days for a part-time employee. Whether the employee is covered by the federal FMLA or State leave or both, employees will not be able to utilize more than 12 workweeks of paid family leave in any consecutive 52 week period. Claim-related disputes involving State Paid Family Leave will be settled by arbitration.

Fourth, can leaves that overlap in cause and scope be taken concurrently? The short answer is yes. If they do not, it may end up that employees get more leave than they should be entitled to. There are several questions outstanding

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concerning how these overlapping purposes will play out with each other. The authorities are working through them. Please check for future developments.

Finally, does the leave involve the birth of a child to a birth mother who is your employee? If this is the case, then both disability and paid family leave apply consecutively. This means a woman will get disability for a certain number of weeks following delivery; she is then is entitled to the State Paid Family Leave for up to eight weeks to bond with that child. While birth mothers who qualify for disability may also take paid family leave, they cannot collect payments from both at the same time in the post-partum period. They can, however, take the two paid periods consecutively and then may qualify for FMLA time unpaid following those two time periods.

Conclusion

These issues are complex and the ways the differing legal requirements will play out in the context of the new State Paid Family Leave Law are still developing. There is a Paid Family Leave hotline where you can address your issues as well. That number is (844) 337-6303. The Workers' Compensation Board also recently sent a letter to all employers concerning the new law, which you will probably have already received by the time this goes to print.

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DE Decisions

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to challenges to voting agreements among stockholders, as well as to director compensation packages.

Background

The allegations were based on a plan in which directors granted themselves options and warrants for the stock of five subsidiaries over which the corporation had voting control. Around the time those options were granted, the board transferred valuable assets and opportunities of the corporation to the subsidiaries. A stockholder challenged the grants as a breach of fiduciary duty due to the excessive value that was given in the form of compensation. The complaint also alleged that the voting agreements amounted to illegal vote buying to the extent that a stockholder was required to vote its shares in a manner that the board of directors instructed.

Issues

The key issues addressed included whether the business judgment rule or the entire fairness standard would apply to the decisions by the board to grant themselves options as a form of compensation, and whether or not the voting agreements were deficient in some manner. The court also addressed the issue of ripeness and whether or not the issues relating to the voting agreement were hypothetical, because the voting agreement only represented a small percentage of the voting shares and did not determine the outcome of any elections to date.

Legal Principles

The court relied on a recent Delaware Supreme Court decision that defined ripeness to include claims that have "matured to a point where judicial action is appropriate." Moreover: "a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the material facts are static." (citing *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014). In this instance, the court found sufficient static material facts to determine whether entering into the voting agreement constituted a breach of fiduciary duty.

Analysis

Regarding the standard applicable to executive compensation decisions, the court explained the well-settled Delaware law that "self-interested compensation decisions made without independent protections are subject to the same entire fairness review as any other interested transaction" (citing *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 745 (Del. Ch. 2007). The court explained the well-known aspects of the entire fairness standard that include both fair dealing and fair price. The court also observed that application of entire fairness review typically precludes dismissal of a complaint on a Rule 12(b)(6) motion to dismiss.

Where a complaint adequately pleads that the board lacks independence, and alleges a claim for excessive compensation, the plaintiff "only need allege some specific facts suggesting unfairness in the transaction in order to shift the burden of proof to defendants to show that the transaction was entirely fair" (citing *In re: Tyson Foods, Inc*., 919 A.2d 563, 589 (Del. Ch. 2007). In this case, the court determined that the complaint satisfied that standard by pleading "some specific facts suggesting unfairness" in the options involved — thereby shifting to defendants the burden of proving that the grant of the options was entirely fair.

Regarding the unfair process analysis, the complaint alleged that no one other than the interested directors ever approved the challenged grants. The grants were also timed around the transfer of valuable assets or opportunities to subsidiaries and the grants were not disclosed as compensation but rather were disclosed in a proxy statement as "related-party transactions." The court reasoned that those allegations gave rise "to at least a reasonably conceivable inference of unfair process."

With respect to the fair price element, the court referred to an

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