

The Rapidly Evolving Legal Landscape for New York Employers

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New York employers need to prepare for compliance with the most expansive paid leave law in the country and need to ensure compliance with New York’s wage transparency law and minimum wage and salary thresholds for exemptions from overtime, which are significantly higher than those under federal law.

In 2017, employers in New York State are facing a number of new laws affecting a wide range of employment issues, including:

- an expansive paid family leave law;
- a law protecting employees’ right to discuss their wages, and;
- higher minimum wages and salary thresholds for exemptions from New York’s overtime law throughout the state.

Employers must be aware of these new legal requirements and ensure compliance, including by updating their policies, procedures, and agreements.

THE NEW YORK PAID FAMILY LEAVE LAW

In 2016, Governor Cuomo signed into law the New York Paid Family Leave Law (the PFL), establishing an employee-funded, partial wage replacement program for employees in New York State. Under the PFL, eligible employees will be paid benefits from a state fund when taking leave to bond with a child, care for a close relative with a serious health condition, or assist with familial obligations when a family member is called to active military service. Once fully phased in, this law will be the most far-reaching paid leave law in the United States, offering 12 weeks of paid leave in any 52-week period.

TAKEAWAYS:

Employers may begin taking deductions from their employees’ pay on July 1, 2017, to finance paid leave benefits to which employees will be entitled beginning January 1, 2018.

New York employers may not prohibit their employees from discussing their wages.

New York’s minimum wage and salary thresholds to qualify for exemptions from overtime are significantly higher than those required by federal law.



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Employers are permitted (but are not required) to begin collecting deductions from employees' wages on July 1, 2017,¹ and on January 1, 2018, eligible employees will be entitled to start taking paid leave. New York employers are, therefore, well advised to act promptly to obtain Paid Family Leave (PFL) coverage under either an existing or new insurance plan (or self-insure) and to revise their existing policies, procedures, and employment agreement provisions regarding employee leave. Employers must provide full PFL benefits directly to their employees, at the employer's own expense, if the employer (i) does not collect employee contributions to provide family leave coverage, and/or (ii) does not provide coverage by purchase of an insurance policy. The summary of the PFL set forth below is based on the contents of the law itself, as well as on the proposed regulations issued by the New York Workers' Compensation Board on February 22, 2017. Final regulations have not yet been issued.

PFL Timeline and Benefits

PFL is a partial—not full—wage replacement program that will be phased in over four years, starting January 1, 2018:

Year	Max. Number of Weeks of FLL (in 52-week period)	Benefit Amount as Percentage of Employee Salary	Not to Exceed Percentage of New York State Average Weekly Rate
1/1/2018	8	50%	50%
1/1/2019	10	55%	55%
1/1/2020	10	60%	60%
1/1/2021	12	67%	67%

When fully phased-in, employees will be eligible to receive up to 67 percent of their salary during their 12 weeks of leave. If their weekly earnings are greater than the state average weekly wage, however, their earnings during their leave period will be capped at 67 percent of the state average weekly wage level. In 2016, the average weekly wage in New York State was \$1,305.92. Although it is likely that the average weekly wage may increase over time, it provides for useful benchmarking: if the average weekly wage were to be stagnant, then the maximum weekly paid benefit in 2018 would be approximately \$653, rising to approximately \$875 per week in 2021.

Eligibility for and Permitted Uses of PFL

Most employees in New York State will be eligible for PFL. (Independent contractors are not covered by the PFL.) Any employer covered by the New York Workers' Compensation Law—regardless of size—will be required to permit eligible employees to take PFL and to deduct contributions from their employees' wages. Full-time employees become eligible for PFL deductions and leave after 26 consecutive weeks of employment, and part-time employees (employees working less than 5 days a week) become eligible after 175 days of employment. The use of scheduled vacation, personal, sick, or other time away from work that has been approved by the employer shall be counted towards the eligibility period as long as the employee has contributed to the cost of family leave benefits during such periods of time. Employers are permitted, but not required, to begin taking deductions from employees' pay upon their first day of employment.

Employees may use PFL to:

1. Bond with their child during the first 12 months after the child's birth, or during the first 12 months after placement of the child for adoption or foster care, including children born or placed prior to January 1, 2018. Employees may not use PFL for prenatal conditions; however, employees may take leave before placement of a child, if required for the placement to proceed, such as leave for attending counseling sessions, court proceedings, meetings with the attorney or doctor representing the birth parent, undergoing a physical examination, or traveling to another country to complete an adoption.
2. Care for a spouse, domestic partner, child, parent, parent-in-law, grandparent, or grandchild with a serious health condition (defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or supervision by a health care provider). To use PFL for such care, the employee must be in close and continuing proximity to the care recipient, meaning that the employee must be at the same location as the family member during the majority of the employment period from which leave has been taken. Travel necessitated for the purpose of securing medication or to arrange care for the family member, or other such deviations determined to be reasonably related to providing care, satisfies this definition.

- Attend to obligations arising because of their spouse, child, domestic partner, or parent being on active duty, or has been notified of an impending call of active duty, in the United States armed forces.

Notably, employees may not use PFL for their own illness, disability, or active duty.

Full-time employees may use PFL intermittently or for less than a full work week in increments of one full day or one-fifth of the weekly benefit.

Part-time employees may take PFL on a daily or weekly basis. If taken weekly, part-time employees are entitled to the same leave as full-time employees, i.e., 8 weeks in 2018, 10 weeks in 2019 and 2020, and 12 weeks in 2021. If taken daily, the part-time employee's maximum period of leave is reduced by the average number of days worked per week as a percentage of the total benefit available for full-time workers. For example, in 2018, a part-time employee who works 3 days a week will receive 60 percent of the 40-day (8-week) total available to a full-time worker, or 24 days maximum in any 52 consecutive week period.

When a part-time employee requests PFL in daily increments rather than as a weekly benefit, the daily benefit shall be calculated based on the employee's average weekly wage divided by the average number of days the employee worked per week. 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 and whether the employee shall be characterized as a part-time or full-time worker, the employer shall average the number of days the employee worked per week over the preceding 26 weeks.

Employees are not entitled to PFL when on administrative leave from their employment. In addition, employees may not receive both disability and PFL benefits for the same period of time. An employee who is eligible for both disability and PFL benefits during the same period of 52 consecutive calendar weeks shall not receive more than 26 total weeks of combined disability and PFL benefits during that period of time.

Couples may use PFL at the same time if they have different employers. If they work for the same employer, however, the employer has the right to deny PFL to more

than one employee at the same time to care for the same family leave recipient, or to bond with a child.

Employer Obligations/Employee Protections

Under the proposed regulations, employers may be responsible for payment of premiums prior to collection of all employee contributions for a policy year. Under these circumstances, the employer may collect employee contributions after the premium payment in order to cover the cost of the paid family leave coverage.

As noted earlier, employers must provide full PFL benefits directly to their employees, at the employer's own expense, if the employer (i) does not collect employee contributions to provide family leave coverage, and/or (ii) does not provide coverage by purchase of an insurance policy. If an employer collects employee contributions but does not use those contributions to provide PFL benefits, the proposed regulations will, if adopted, require the employer to refund those contributions to employees.

Employees are guaranteed job protection upon return from PFL. Employers must return employees to the same or a similar position as they held prior to their PFL. Employers are required to maintain employees' health insurance benefits for the duration of their PFL. If employees contribute to the cost of their health insurance, they must continue to do so while on leave. However, employees are not entitled to accrue seniority or other benefits during their PFL.

Employers must provide employees whose regular schedules will render them ineligible for PFL (i.e., those scheduled to work less than 26 weeks or 175 days in a year) with the option to file a waiver to exempt them from the required wage deductions. Employers are permitted to make deductions from the pay of such employees who do not opt to file such a waiver.

If an employer maintains written guidance for employees concerning employee benefits or leave rights, such as an employee handbook, information concerning leave and employee obligations under the PFL shall be included in the handbook or other written guidance. If an employer does not have any written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer must provide written guidance to each employee concerning all of the employee's rights and obligations under the PFL, including information on how to file a claim for paid family leave. In addition, every employer

must display and keep posted a notice concerning paid family leave in plain view where all employees and/or applicants can readily see it.

Employers may be exempt from providing PFL to employees covered by a collective bargaining agreement that provides benefits at least as favorable as those in the regulations.

An employer that fails to comply with the PFL to provide coverage for family leave benefits is subject to a penalty not to exceed 0.5 percent of the employer's weekly payroll for the period of such failure, plus an additional amount not to exceed \$500.

Employee Obligations and Filing Claims

If the PFL is foreseeable, employees must provide their employer with at least 30 days advance notice. The notice must be sufficient to make the employer aware of the reason for the leave and the anticipated timing and duration of the leave. If an employee fails to comply with the notice requirements, a self-insured employer or the insurance carrier may file a partial denial of the claim for a period of up to 30 days from the date notice is provided. If the need for leave is not foreseeable 30 days in advance, the employee must notify his or her employer as soon as practicable.

For leave taken to care for a family member with a serious health condition, the employee must obtain medical certification from the health provider with information about the patient's health condition, and an estimation of the frequency and duration of leave, among other information. For PFL due to a family member's active duty, the employee must provide a copy of the military member's active duty orders and/or other documentation supporting the leave.

Interaction with Current Paid Leave Policies and FMLA

Employers cannot require employees to use any accrued vacation, sick, personal, or other paid time off before using PFL; however, employers may permit employees to use accrued paid leave to supplement their PFL benefits to receive full pay replacement during their leave. In the event that an employer offers, and the eligible employee exercises, an option to charge all or part of his or her family leave time to accrued paid time off and receive full salary, the employer may request reimbursement from the carrier out of any family leave benefits due or to become due by filing its claim for reimbursement with the carrier prior to the carrier's payment of such family leave benefits. The actual reimbursement amount may be computed after family leave is complete.

PFL benefits run concurrently with FMLA benefits; employees cannot stack their FMLA and PFL to take more than the maximum amount of leave permitted by the PFL.

Employees may not concurrently receive paid sick leave under the New York City Earned Sick Time Act while receiving PFL benefits. In addition, employees may not use PFL while receiving total disability benefits under a workers' compensation claim. If an employee is receiving only partial disability benefits, however, he or she may receive supplemental PFL benefits up to the amount of the employee's average weekly wage.

Dispute Resolution

Any claim-related dispute, including any dispute concerning eligibility, benefit rate, and duration of paid leave, arising under the PFL is subject to arbitration. The proposed regulations provide the framework for such arbitration, including the procedure for filing and withdrawing a request for arbitration, the fee structure, the assignment of arbitrators, and arbitration procedure, review, and enforcement.

THE NEW YORK WAGE TRANSPARENCY LAW

Employers in New York State need to ensure that their policies and procedures are compliant with the amendments to New York Labor Law Section 194(4) making it illegal for employers to prohibit their employees from inquiring about, discussing, or disclosing their wages or those of other employees with each other. This law took effect on February 1, 2017 (the Wage Transparency Law).

Pursuant to the Wage Transparency Law, employers are permitted to adopt a written policy provided to all employees that imposes reasonable workplace and workday limitations on the time, place, and manner for inquiries about, discussion of, or the disclosure of wages. Such limitations, however, may not specifically reference the inquiry, discussion, and disclosure of wages nor can they be so restrictive so as to effectively eliminate any ability to engage in such discussions. Moreover, employers must respect the right of non-supervisory employees to discuss the terms and conditions of employment with other employees for the purpose of mutual aid or protection consistent with the federal National Labor Relations Act.

Pursuant to the final regulations implementing the Wage Transparency Law issued on February 1, 2017, employers may prohibit employees from discussing or disclosing the wages of another employee unless the other employee

has provided his or her verbal or written consent, either directly or indirectly. Such consent may be withdrawn at any time. Employers may also limit disclosure by an employee who has access to wage information of other employees as part of that employee's essential job functions (e.g., human resources and payroll personnel).

The Wage Transparency Law prohibits employers from retaliating against any employee who exercises his or her rights pursuant to this law.

In the final regulations, the New York Department of Labor (NY DOL) clarified that employers do not need to post notice of employees' rights under Section 194(4). However, employers are required to use the Notices

of Rate of Pay (which must be provided to employees pursuant to Labor Law Section 195) that have been revised by the NY DOL to include a statement reflecting these wage transparency rights. The revised Notices are accessible on the NY DOL's website:

Notice for Hourly Rate Employees

<https://labor.ny.gov/formsdocs/wp/LS54.pdf>

Notice for Employees Paid Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate, or Other Non-Hourly Pay:

<https://labor.ny.gov/formsdocs/wp/LS57.pdf>

Notice for Exempt Employees

<https://www.labor.ny.gov/formsdocs/wp/LS59.pdf>

MINIMUM WAGE AND SALARY THRESHOLD INCREASES

Finally, while the federal minimum wage has not increased for years, and the fate of the new federal overtime rules is still uncertain, New York State employers face increasing minimum wage and salary requirements for their non-exempt and exempt employees.

Minimum Wage

As of December 31, 2016, and through 2021, the following general minimum wage rates apply throughout the State:

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC - Large Employers (employers of 11 or more employees)	\$11.00	\$13.00	\$15.00			
NYC - Small Employers (employers with 10 or fewer employees)	\$10.50	\$12.00	\$13.50	\$15.00		
Nassau, Suffolk, and Westchester counties	\$10.00	\$11.00	\$12.00	\$13.00	\$14.00	\$15.00
Remainder of New York State	\$9.70	\$10.40	\$11.10	\$11.80	\$12.50	TBD

The minimum wage rates for fast food workers, tipped food service employees and tipped service employees have also been increased. As of December 31, 2016, and through 2021, the following minimum wage rates apply throughout the State for these employees:

Fast Food Workers

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC	\$12.00	\$13.50	\$15.00			
Remainder of New York State	\$10.75	\$11.75	\$12.75	\$13.75	\$14.50	\$15.00

Tipped Food Service Employees
Cash Wage Paid by Employer (minimum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$7.50	\$8.65	\$10.00	\$10.00	\$10.00	\$10.00
NYC – Small Employers (employers with 10 or fewer employees)	\$7.50	\$8.00	\$9.00	\$10.00	\$10.00	\$10.00
Nassau, Suffolk, and Westchester counties	\$7.50	\$7.50	\$8.00	\$8.65	\$9.35	\$10.00
Remainder of New York State	\$7.50	\$7.50	\$7.50	\$7.85	\$8.35	TBD

Credit for Tips Received (maximum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$3.50	\$4.35	\$5.00	\$5.00	\$5.00	\$5.00
NYC – Small Employers (employers with 10 or fewer employees)	\$3.00	\$4.00	\$4.50	\$5.00	\$5.00	\$5.00
Nassau, Suffolk, and Westchester counties	\$2.50	\$3.50	\$4.00	\$4.35	\$4.65	\$5.00
Remainder of New York State	\$2.20	\$2.90	\$3.60	\$3.95	\$4.15	TBD

Other Tipped Service Employees
Cash Wage Paid by Employer (minimum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$9.15	\$10.85	\$12.50	\$12.50	\$12.50	\$12.50
NYC – Small Employers (employers with 10 or fewer employees)	\$8.75	\$10.00	\$11.25	\$12.50	\$12.50	\$12.50
Nassau, Suffolk, and Westchester counties	\$8.35	\$9.15	\$10.00	\$10.85	\$11.65	\$12.50
Remainder of New York State	\$8.10	\$8.65	\$9.25	\$9.85	\$10.40	TBD

Credit for Tips Received (maximum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$1.85	\$2.15	\$2.50	\$2.50	\$2.50	\$2.50
NYC – Small Employers (employers with 10 or fewer employees)	\$1.75	\$2.00	\$2.25	\$2.50	\$2.50	\$2.50
Nassau, Suffolk, and Westchester counties	\$1.65	\$1.85	\$2.00	\$2.15	\$2.35	\$2.50
Remainder of New York State	\$1.60	\$1.75	\$1.85	\$1.95	\$2.10	TBD

Threshold Tips Required in Restaurants and All Year Hotels (minimum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$2.40	\$2.80	\$3.25	\$3.25	\$3.25	\$3.25
NYC – Small Employers (employers with 10 or fewer employees)	\$2.30	\$2.60	\$2.95	\$3.25	\$3.25	\$3.25
Nassau, Suffolk, and Westchester counties	\$2.15	\$2.40	\$2.60	\$2.80	\$3.05	\$3.25
Remainder of New York State	\$2.10	\$2.25	\$2.40	\$2.55	\$2.70	TBD

Threshold Tips Required in Resort Hotels (minimum)

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC – Large Employers (employers of 11 or more employees)	\$6.15	\$7.30	\$8.40	\$8.40	\$8.40	\$8.40
NYC – Small Employers (employers with 10 or fewer employees)	\$5.90	\$6.75	\$7.60	\$8.40	\$8.40	\$8.40
Nassau, Suffolk, and Westchester counties	\$5.60	\$6.15	\$6.75	\$7.30	\$7.85	\$8.40
Remainder of New York State	\$5.45	\$5.85	\$6.25	\$6.60	\$7.00	TBD

Minimum Salary Thresholds for the Administrative and Executive Exemptions under New York Law

New York employers also need to comply with both the federal Fair Labor Standards Act and New York wage and hour law with respect to the payment of overtime to employees who are not exempt from overtime requirements. There is no salary basis requirement to qualify as an exempt professional under New York law. However, New York law does have a salary basis requirement to qualify as an exempt administrative or executive employee that is far higher than the current federal salary basis requirement and is set to further increase within the next few years. As of December 31, 2016, and through 2021, to be exempt from New York’s overtime requirements as an exempt administrative or executive employee, employees must be paid at least:

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021
NYC - Large Employers (employers of 11 or more employees)	\$825.00/week \$42,900 annually	\$975.00/week \$50,700 annually	\$1,125.00/week \$58,500 annually			
NYC - Small Employers (employees with 10 or fewer employees)	\$787.50/week \$40,950 annually	\$900.00/week \$46,800 annually	\$1,012.50/week \$52,650 annually	\$1,125.00/week \$58,500 annually		
Nassau, Suffolk, and Westchester counties	\$750.00/week \$39,000 annually	\$825.00/week \$42,900 annually	\$900.00/week \$46,800 annually	\$975.00/week \$50,700 annually	\$1,050.00/week 54,600 annually	\$1,125.00/week \$58,500 annually
Remainder of New York State	\$727.50/week \$37,830 annually	\$780.00/week \$40,560 annually	\$832.00/week \$43,264 annually	\$885.00/week \$46,020 annually	\$937.50/week \$48,750 annually	

In addition to meeting this salary-basis test, to be an exempt administrative employee under New York law:

- An employee’s primary duty must consist of the performance of office or non-manual field work directly related to management policies or general operations;
- An employee must customarily and regularly exercise discretion and independent judgment; and
- An employee must regularly and directly assist an employer, or an employee employed in a bona fide executive or administrative capacity or who performs under general supervision, with work along specialized or technical lines requiring special training, experience, or knowledge.

In addition to meeting the salary-basis test, to be an exempt executive employee under New York law:

- An employee’s primary duty must consist of the management of the enterprise;
- An employee must customarily and regularly direct the work of two or more other employees;
- An employee must have the authority to hire or fire other employees;
- An employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must have particular weight; and
- An employee must customarily and regularly exercise discretionary powers.

Endnotes

¹ The New York State Superintendent of Financial Services is scheduled to set the maximum employee contribution amount on June 1, 2017.