



LUNCH WITH A LAWYER

**LEGAL BASICS:
PAID FAMILY LEAVE
AND NYS SHORT TERM DISABILITY**

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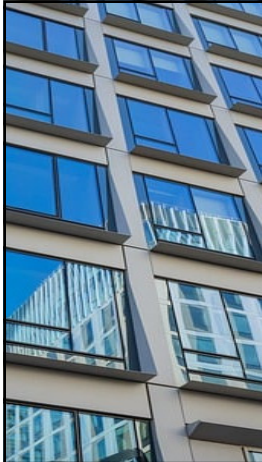
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**NEW YORK
PAID
FAMILY
LEAVE**

[HTTPS://WWW.NY.GOV/SITES/DEFAULT/FILES/ATOMS/FILES/PSL_FAQ_PAIDSICKLEAVEFAQ.PDF](https://www.ny.gov/sites/default/files/atoms/files/psl_faq_paid_sickleleavefaq.pdf)



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**WHAT
BUSINESSES
ARE COVERED?**

- Most Private Businesses

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**EXCLUDED
EMPLOYEES**

- Ministers, priests, rabbis
- Professional or teaching capacity for a non-profit
- Golf Caddy

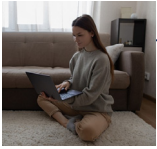
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**OTHER
EXEMPTION**

- Owners/Shareholders of partnerships, LLCs, LLPs, sole proprietorships ("business owners") without employees
- Owners/shareholders of a corporation with 1 or 2 officers who own all the stock of the corporation and have no employees

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OUT OF STATE WORKERS?

- Only Employees Who “Work in New York”
 - Live in PA; Work in NY-Covered
 - Live in NY; Work in PA—Not Covered
 - Live in PA; Work Remotely in PA for NY Company—Not Covered
- “employment must be localized in New York State, which means that most of your work is performed in New York”
- <https://paidfamilyleave.ny.gov/eligibility>

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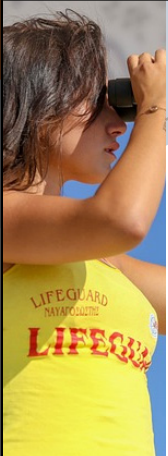
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EMPLOYEE ELIGIBILITY

- Full Time Workers—
Work 20 Hours or More Per Week 
 - Eligible after 26 weeks of employment
- Part-Time Workers—
Work Less than 20 Hours Per Week 
 - Eligible after 175 days
(not necessarily in 1 year)

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WAIVER OF COVERAGE

- Only available if:
 - Regular schedule less than 20 hours in a week and will not work 175 days in a year; OR
 - Regular schedule of 20 or more hours in a week and will not work 26 consecutive weeks

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WHAT IF AN EMPLOYEE WHO OPTED OUT BECOMES ELIGIBLE?

- Employer Must Deduct the **entire** amount of PFL contributions from the Employee (or pay it themselves)
- NOTE: Be **very** careful with opt outs.

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TRICKY ISSUES


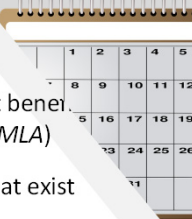
- Domestic Worker—20 or more hours per week, covered
- Two Employers—General Employer is on the hook; Special Employer may also be on the hook (*Best Practice: Address this in the Agreement*)



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WHAT IS THE BENEFIT?

- 12 Weeks of Leave
- 67% of average weekly wage
- Restored to same position without benefit loss (*note: slightly different from FMLA*)
- Cannot reduce accrued benefits that exist at the time of leave
- No waiting period



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HEALTH INSURANCE

- ERISA Pre-emption for Self Insured Plans
- Employer must provide health insurance, subject to employee's usual contribution which they must pay to the Employer directly (not deducted from benefits)
- If that amount changes during the time an employee is on paid leave, the employee on leave is required to pay the new amount just like all other employees affected by the change.



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Covered Reasons for PFL

- BIRTH OR ADOPTION
- ILLNESS OF FAMILY MEMBER
- MILITARY



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BIRTH, ADOPTION or FOSTER

- Limited to 52 weeks from date of birth or placement of foster or adoption.
- Foster or adoption limited to children under 17 year of age
- Foster and Adoption can take leave prior to the placement if the absence from work is "required" for the foster or adoption to proceed.
- Can receive both disability and family leave during post-partum period, but not at the same time.



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SERIOUS HEALTH CONDITION OF A FAMILY MEMBER

- Serious Health Condition definition tracks language of FMLA:
 - 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 continuing supervision by a health care provider.



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Family Member Cont.

- “Serious health condition” means that the person receiving care is unable to work, attend school, perform regular daily activities, or is otherwise incapacitated for at least 4 consecutive days with either:
 - at least 2 doctor treatments or
 - 1 doctor treatment and a doctor-supervised regimen thereafter



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WHAT ELSE?

- Providing care requires that the employee must be in “close and continuing proximity” to the care recipient, i.e., the same location
- “close and continuing proximity” does not prohibit travel to and from place of care-giving



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WHO IS A FAMILY MEMBER?

- Spouse
- Domestic Partner
- Child
- Parent
- Parent in-law
- Grandparent
- Grandchild
- Sibling (added 2023)

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Clarifying Family Member


- “Parent” defined very broadly - includes foster parent(s) or person(s) who acted as parent while child was minor
- “Child” determined by what happened before age 18, but care for child can be at any time including adult



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MILITARY LEAVE

- based upon a qualifying exigency as interpreted under the Family and Medical Leave Act, 29 U.S.C.S 2612(a)(1)(e) and 29 C.F.R. 825.126(b)(1)-(9) arising out of the fact that the spouse, domestic partner, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces of the United States



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MILITARY LEAVE (CONT.)


- Regular Armed Forces deployment of the member with the Armed Forces to a foreign country.
- Members of the Reserve components of the Armed Forces (members of the National Guard and Reserves) deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation

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WHAT ABOUT EMPLOYEE OWN ILLNESS/SURGERY/ETC

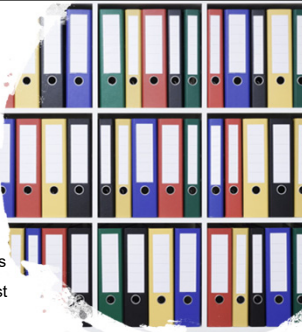
- **NO**
 - NY Paid Sick Leave (Covid Leave)
 - FMLA (Employer with 50 or more employees)
 - Worker’s Compensation (work related injury/illness)
 - Disability (not work related)



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WHAT’S THE PROCESS AND PAPERWORK?

- Employee must provide at least 30 days of notice where possible to do so. In all other cases, must provide as much notice as possible.
 - No notice *can* equal up to 30 day denial (delay) of benefits
- Employee must complete the Request for Paid Family Leave (PFL-1) and provide appropriate documentation.
 - Medical Provider Certificate
 - Birth Certificate or Adoption Order
 - Military Order



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WHAT HAPPENS NEXT?


Decision is supposed to be made by insurance company about whether leave qualifies within 18 days of application

Question: What happens if employee leaves on an emergency basis and leave is denied? May need to address this in your policy

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NOTICE REQUIREMENTS


- Must provide notice to employees in an employee handbook or other written policy
- <https://www.wcb.ny.gov/content/main/forms/PFLDocs/pfl-model-language-for-employee-materials-2024.pdf>
- Must post written notice
 - This Comes from WCB



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WHAT ABOUT INTERMITTENT LEAVE

- Leave that is not taken in a block of time
- Unlike NY statutory disability, or FMLA following birth of child, NY PFL can be taken in intervals, such as every other Monday or even less predictably (if Mom needs to go to the hospital)



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CAN EMPLOYEE GET BOTH PFL AND ANOTHER LEAVE?

• **YES, BUT**

- Cannot get disability and PFL at the same time (total of 26 weeks in one year)
- Cannot get PFL while on Worker's Compensation



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FMLA AND PFL

- Can Run Them at the Same Time for the Same Reasons
- Must Make Sure You Do the Paperwork Right



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OTHER CAVEATS

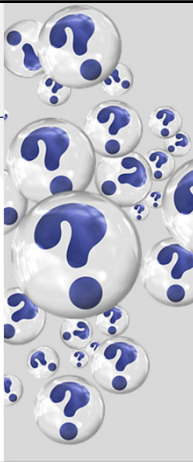
- Cannot typically require employee to use their PTO (exception for FMLA)
- Employer *may* permit employees to supplement PFL benefits up to their full salary
- Employer *may* have policy paying employees for leave
- Employer permitting paid leave that is used may apply for reimbursement
- Must Address Accrual of Paid Leave in Writing



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PRACTICE QUESTIONS

- Susie is pregnant. Her doctor takes her out of work 1 week before her delivery. She delivers by C-section. How much job protected time off can Susie get?



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IF FMLA APPLIES:

- 9 weeks disability (1 for the week before birth; 8 for recovery from C-section)
- 12 weeks PFL

Total: 21 weeks



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IF NO FMLA

- Only the 12 weeks of PFL is job protected, BUT you would likely have to allow the one week as an accommodation under the NY Human Rights Law

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PRACTICE QUESTION

- Joe’s wife gave birth and he took 2 weeks off. He’s now informed you that he plans to take every Friday off going forward until his other 10 weeks is used up. Can he do this?



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ANSWER: YES

Assuming full time work, he will be able to take off Friday for a year (5 x 10 = 50 days).

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PRACTICE QUESTION 3

- Jill is caring for her mother who has dementia. She calls out here and there and asks to use PFL instead of her other time off. Can she insist on using PFL instead of her other time?



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ANSWER: YES

- 12 weeks x 5 days a week = 60 days to use to care for mother. She must give whatever notice she can, but likely less than 30 days.

Note: PFL can only be taken in full day increments.



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PRACTICE QUESTION

- An Employee on leave is late paying their portion of the health insurance. Can the employer terminate their health insurance?



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WHAT STEPS SHOULD EMPLOYER TAKE?

- If the employee on leave is more than 30 days late with providing the payment, the Employer may initiate the following steps to stop their health insurance coverage:
 - Send a written notice at least 15 days before intending to end coverage and give employee the option to remit any outstanding balance within 15 days
 - If payment not received within the 15-day window, may terminate the employee's health insurance coverage.
 - If there are any other established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, may drop the employee retroactively in accordance with that policy, provided the 15-day notice was given.

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WHAT ABOUT ABUSE?

Hard to Prove

BUT,
you can discipline
for abuse


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WHAT TO DO NOW?

- Review the FAQ and Fact Sheet
<https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave#:~:text=Existing%20Policies-,Existing%20Policies,further%20obligations%20on%20that%20e,mployer.>
- Have a Written Policy
 - Address Payout
 - Address Accrual
 - Address Other Leaves


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YOUR QUESTIONS

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**UPCOMING LUNCH
WITH A LAWYER**

- June 26—Legal Update
- Available on-line: *Legal Basics, Paid Sick Leave and COVID Leave*
https://www.hhk.com/lw-webinar-materials-2024-Q2_lbasics_nys-paid-sickcovidleave/

Many others on-line too!

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