CLIENT ALERTS & INSIGHTS

Paid Family and Medical Leave Escalation Expected in 2023

DECEMBER 30, 2022

Authors: W. Eric Baisden, Adam Primm, Christopher W. Pendleton

As the calendar turns to 2023, employers in several states are currently navigating or preparing to navigate laws mandating the provision of paid family and medical leave ("PFML"), i.e., partially paid, job-protected leave, to employees who take time off from work to care for a new child, tend to a sick family member or complications related to a family member's military service, or take care of their own serious health problem.

At Present

Presently, eleven states and the District of Columbia have enacted PFML laws that cover most private employers. In each state, funding for the PFML programs is achieved through payroll tax deductions. PFML laws are currently in effect and providing employees with paid, job-protected leave in California, Connecticut, Massachusetts, New Jersey, New York, Rhode Island, Washington and the District of Columbia. Meanwhile, PFML legislation has been passed but is still being implemented in Colorado, Delaware, Maryland and Oregon. Benefits do not become available under Delaware's PFML law until 2026 and not under Maryland's PFML law until 2025. However, the PFML programs in Colorado and Oregon will become effective in the new year, with payroll deductions commencing in each state on January 1st.

Colorado PFML Program

Colorado's program will provide Colorado employees with twelve weeks of PFML to care for a child following birth, adoption, or placement through foster care; to care for a family member with a serious health condition; to care for the employee's own serious health condition; to take "qualifying exigency leave," related to a family member's military service; or to take "safe leave," which includes time to obtain a civil protection order, receive medical or mental health care for themselves or a family member, secure their home from a perpetrator, or seek legal assistance for domestic violence, stalking, sexual assault, or abuse-related issues. Employees who take leave for pregnancy or childbirth complications may receive up to sixteen weeks of leave.

To be eligible, an employee must have made at least $2,500 in four out of five previous calendar quarters before starting Colorado PFML. Colorado employees on leave may receive up to 90 percent of their average weekly wage for the portion of wages that totals up to 50 percent of the state average weekly wage or less. For the portion of employee wages that exceed 50 percent of the state average weekly wage, employees may only receive 50 percent of their average weekly wage.

PMFL in Colorado will be funded through a payroll tax paid half by employers and half by employees. All Colorado employers that employ at least one employee in Colorado or that paid wages of at least $1,500 during a calendar quarter must participate in the program by providing PFML. However, employers with fewer than ten employees companywide (not just in Colorado) during twenty or more workweeks in the previous calendar year do not have to pay the employer share of the premiums. These small employers need only collect the employee's share of the premiums and ensure they are submitted to the state in accordance with the requirements of the law. The number of employees employed by an employer will not affect an eligible employee's right to PFML in Colorado.

Oregon's PFML Program

Like Colorado, Oregon's program allows eligible employees to take up to twelve weeks of paid, job-protected leave to bond with a new child after birth or adoption; to care for a family member with a serious illness or injury; to care for the employee's own serious health condition; or to take leave if the employee or the employee's family member has experienced domestic violence, sexual assault, or harassment. Employees who take leave for pregnancy or childbirth complications may receive up to fourteen weeks of leave.

To be eligible, an employee must have made at least $1,000 in four out of five previous calendar quarters before starting Oregon PFML. In 2023, Oregon employees who take PFML will receive weekly wages calculated based on their salary and the Oregon average weekly wage of $1224.82, with weekly paid leave benefits capped at 120% of that number (i.e., $1,469.78).

Oregon's PFML program is funded through a payroll tax that is shared between employees and employers with 25 or more employees companywide (not just in Oregon). Oregon employees pay 60% of the contribution rate, while qualifying employers pay 40%.

In both Colorado and Oregon, employers may not require employees to use accrued paid time off, including sick time or vacation, prior to receiving PFML. However, the employer may allow the employee to use any accrued vacation, sick, or other time off to supplement his or her PFML benefits and obtain his or her full weekly wage. In addition, where the qualifying reasons for taking PFML under the Oregon Family Leave Act (OFLA) or FMLA are the same, the leaves will run concurrently. Colorado employees may take various forms of leave, including continuous leave, intermittent leave, or leave on a reduced schedule. Oregon employees may take leave under PFML intermittently in weekly or daily increments.

In 2023 and Beyond

In addition to those states that have already enacted legislation, several others are considering such a move. For example, private employers in Minnesota and Michigan should expect state paid family leave proposals in 2023. At present, neither state mandates that employers provide paid, job-protected leave to employees who take time off from work for qualifying PMFL reasons. This is expected to change next year, when Democrats control both the Minnesota and Michigan state legislatures.

Specifically, in Minnesota, Gov. Tim Walz (D) has indicated that passing paid family leave legislation is a top priority for his administration in the coming year. As in other states, the Minnesota plan would have workers and employers pay into a state pool that functions like an unemployment insurance fund. That fund would then be used to provide partial wage replacement for workers that need to take time off to care for a new baby or for a loved one or to recover from sickness. Prior versions of the bill would give workers twelve weeks of paid family leave and twelve weeks of medical leave (including for pregnancy complications), though the details are still subject to negotiation. Under the most recent House version of the proposal, workers would start receiving benefits in 2023, but employers would not begin paying premiums until 2024.

Michigan, under Gov. Gretchen Whitmer (D), has offered twelve weeks of paid family leave to state employees since February of 2020. However, there is no such benefit for Michigan employees in the private sector. Gov. Whitmer indicated in a personal thread on her Twitter account in March 2022 that she wants to work to "extend this policy to every Michigander." With Democrats controlling both Michigan's House and Senate in 2023 for the first time since 1984, she may finally be able to do it.

Elsewhere, Maine's Commission to Develop a Paid Family and Medical Leave Benefits Program conducted over a year of research on, among other things, the qualifying reasons for taking PFML, who would be covered by a PFML program, and whether public sector employees would automatically be covered by the program. That commission updated its final recommendations earlier this month, which will be considered by the Maine legislature in 2023.

Likewise, the New Mexico Paid Family and Medical Leave Taskforce undertook a similar analysis of the viability of a PFML program and submitted its report and recommendations for consideration to that state's legislature in October 2022.

Voluntary PFML Programs

In contrast to mandatory programs, three states have "opt-in" PFML models that encourage, rather than require, some employers to participate. The first state to establish such a model was Virginia, whose program took effect on July 1, 2022. Virginia's program allows employers to purchase paid leave insurance but does not mandate that employers provide such leave.

Virginia's influence extended to New Hampshire, whose PFML program limits mandatory coverage to state employees while private employers and employees have the option to buy into benefits coverage. New Hampshire's program becomes effective January 1, 2023. Not to be outdone by its New England neighbor, Vermont created its own opt-in PFML program, with state employees there having access to PFML benefits starting July 1, 2023. The program will become available to private-sector employers with two or more employees one year later, and then to individual workers whose employers don't choose to provide paid leave beginning a year after that.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

W. Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

Christopher W. Pendleton at cpendleton@beneschlaw.com or 216.363.6219