

How Multistate Employers Can Tackle Paid Leave Compliance

By **Anne Dana and Matthew Krimski** (July 11, 2022, 6:06 PM EDT)

Although the Biden administration's proposal for a nationwide paid family and medical leave, or PFML, program stalled in Congress late last year, states across the country have been more active than ever on this issue.

During the first half of 2022 alone, five states — almost half of the 11 states that have now passed PFML legislation — took significant steps toward establishing or expanding their PFML programs. Continued activity is expected throughout the second half of the year, as PFML laws are winding through statehouses across the country.

Vigorous state-level efforts to pass PFML laws are fueled by strong public support from voters and lawmakers alike. Recent nationwide polls have been consistent and estimate that around 70% to 75% of Americans are in favor of a nationwide PFML policy. Even numerous employers and business interest and trade groups have been vocal supporters of PFML.

Furthermore, as the COVID-19 pandemic continues to cause disruptions in the workforce and drives increased public sentiment in favor of employee rights, efforts to enact more robust PFML programs are expected to resonate across the country. It is likely that more states will join the existing wave in their forthcoming legislative terms.

Although PFML laws across the nation share high-level similarities, the many practical and elemental differences in these laws across the states will create significant administrative and compliance challenges for multistate employers.

Employers — especially those that have employees in more than one state — must pay careful attention to the specific requirements in each state and ensure that their policies meet or exceed them.

Current Status and Recent Activity

Kicking off the PFML activity in 2022 was Washington state, which amended its existing Paid Family and Medical Leave Act to broaden coverage in targeted ways, including by:



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- Permitting eligible employees to use up to seven days of paid family leave for bereavement after the death of a child in qualifying circumstances;
- Classifying post-natal leave — taken during the first six weeks after birth for an incapacity due to pregnancy — as medical leave, which works to give parents more paid leave under the law than if they had only used family leave; and
- No longer requiring eligible employees to provide certification of a serious health issue to take paid leave during the post-natal period.

The full range of Washington's amendments went into effect on June 9, although eligible employees have already been collecting benefits under the PFML program since January 2020.

Most notably, Maryland and Delaware became the 10th and 11th states this year, in addition to the District of Columbia and San Francisco, to pass comprehensive PFML programs.

In April, Maryland's Time to Care Act of 2022, S.B. 275/H.B. 8, passed into law over the governor's veto. Eligible employees — those who have worked for at least 680 hours over the preceding 12 months — may take up to 12 weeks of job-protected PFML annually for purposes generally similar to those permitted under the federal Family and Medical Leave Act, or FMLA.

An additional 12 weeks of PFML, for a total of 24 weeks, are permitted if an employee qualifies for both parental leave to care for a newborn or newly placed child and medical leave due to their own serious health condition in the same year.

PFML in Maryland is available after an employee exhausts all other employer-provided leave, such as paid time off or sick leave, and runs concurrently with FMLA leave. Eligible Maryland employees may begin collecting paid leave from the Maryland Family Medical Leave Insurance Fund on Jan. 1, 2025, with contributions to the fund beginning in 2023.

Contributions to the fund are mandatory for all employees in Maryland but only mandatory for employers with 15 or more employees, although exact contribution percentages have not yet been set. Maryland's law covers all employers that employ at least one person in the state.

In May, Delaware's governor signed into law the Healthy Delaware Families Act, S.B. 1, which begins providing PFML benefits to eligible Delaware workers on Jan. 1, 2026, with contributions beginning in 2025.

Eligible Delaware employees may take up to 12 weeks of paid parental leave within a 12-month application year, or six weeks of either paid family/caregiver leave or medical leave, within a 24-month period.

Eligible employees may also take paid leave under Delaware's law for the same purposes leave may be taken under the FMLA. PFML in Delaware runs concurrently with FMLA leave and cannot be taken in addition to FMLA leave.

The extent of coverage under Delaware's law depends on the number of individuals who worked for the employer within the state over the previous 12 months: Employers with 10 to 24 employees are only subject to the parental leave provisions of the law; employers with 25 or more employees are subject to all provisions of the law.

Employers that have employed less than 10 employees in Delaware in the previous 12 months are exempt from the law. Delaware will fund paid leave and benefits through payroll contributions made into the Family and Medical Leave Insurance Fund that is established under the new law.

In addition, in April, Oregon's Employment Department issued proposed administrative rules to enforce its Paid Family and Medical Leave Act, passed in 2019. Oregon will begin implementing its PFML program in less than a year: contributions to the fund start January 2023 and employees can start collecting benefits in September 2023.

Also this year, Colorado issued regulations and guidance implementing its Paid Family and Medical Leave Insurance, or FAMLI, Act, which was passed by Colorado voters at the ballot in 2020. Employer and employee contributions to the FAMLI program begin on Jan. 1, 2023, and eligible employees start collecting benefits a year later, on Jan. 1, 2024.

Notably, the Colorado Supreme Court upheld its Paid FAMLI Act and insurance program last month after a challenge to the program's funding scheme in *Chronos Builders LLC v. Colorado Department of Labor and Employment, Division of Family and Medical Leave Insurance*. Therefore, employers should prepare to implement the FAMLI program.

Prior to 2022, similar mandatory paid family and/or medical leave programs had already been established in a number of places, specifically: California, Connecticut, the District of Columbia, Massachusetts, New Jersey, New York, Rhode Island and Washington. A voluntary paid family and medical leave program also goes into effect in New Hampshire on Jan. 1, 2023.

The movement toward PMFL programs does not appear to be abating. Newly introduced legislation providing for paid family and/or medical leave has recently been considered in 11 more states, including Arizona, Illinois, Iowa, Minnesota, North Carolina, Oklahoma, Pennsylvania, Tennessee, West Virginia, Vermont and Virginia.

As of this writing, the only state that is currently bucking this trend is North Dakota, which passed a law in 2021 that prohibits cities and counties from enacting paid family and medical leave programs that exceed the requirements of federal or state laws and rules.

National Trends

Across the 11 states' PFML laws, there are high-level similarities and certain elements that are incorporated into nearly every new PFML program passed into law. These include:

- PFML programs are generally administered by a state agency and related insurance system. The state agencies are responsible for setting employee/employer contribution rates and benefit payment amounts.
- Nearly all PFML programs are funded, at least in part, by payroll contributions from employees. Notably, California's, Connecticut's and Rhode Island's PFML programs are funded entirely by employees.
- All PFML programs permit eligible employees to take job-protected paid time off under similar categories of parental, family caregiver and military exigency leaves that are available under the FMLA. Most, but not all, also permit personal medical leave.

- Although definitions and entitlements vary, nearly all PFML programs permit employees to take leave for a similar limited range of significant life events covered by the FMLA: pregnancy/childbirth, severe illness and active military service. That said, certain states go above and beyond, for example, by permitting employees to take PFML when a family member is a victim of domestic violence or sexual violence, or when a child's school or childcare provider is closed for a public health emergency.

Practical Considerations for Employers

In terms of the broader trend of the proliferation of PFML programs across the country, employers should start considering how to ensure compliance with PFML laws in the jurisdictions where they operate.

Employers can begin preparing to comply by planning to adjust their payroll practices as necessary, informing human resources and managers of the new requirements, preparing notices as required by PFML laws and revising any noncompliant policies.

Employers must also ensure they are paying attention to amendments to existing laws, as states are continually updating both the laws and the accompanying guidance. Employers' policies will need to keep up with these changes.

Employers will inevitably face challenges when attempting to understand and meet their requirements — in particular, the intersection of these paid leave laws with other state-level disability and sick leave laws, and the federal FMLA. Employers will need to pay particular attention to whether PFML runs either concurrently or consecutively with an employer's existing benefits and/or other state- or federally required leaves.

Resolving these issues in some states may be relatively straightforward; for example, FMLA leave runs concurrently with PFML in Maryland and Delaware.

But it may be less clear in other states, as seen in Washington's FMLA Program Benefit Guide, which explains that FMLA does not reduce an employee's allowed PFML benefit but that the two "usually" can run concurrently.

Some states also add additional factors to the calculus, making it more complicated: In Colorado, FMLA and FAMI run concurrently, but employers cannot require that employees use accrued vacation, sick leave, or other paid time off before receiving FAMI.

While multi-state employers may wish to implement one uniform policy, such an approach is nearly impossible given the patchwork of state PFML laws. Typically, employers are implementing state addendums to employee handbooks in order to address these laws. This, however, also heightens complaints by employees over unequal leave practices for those who are not entitled to PFML under state law.

Moreover, as employers continue to grapple with remote workforces and employees who have moved elsewhere during the pandemic, it will be important for employers to implement policies and rules to ensure they know the locations from which employees are working.

The PFML laws in California, Colorado, Maryland and Oregon, in particular, highlight how having just one

employee in a state can trigger legal compliance requirements.

As most of the PFML laws penalize employers for noncompliance and create civil remedies for aggrieved employees, ensuring compliance is both a legal and financial necessity for many employers.

Indeed, the remedies in many PFML laws have teeth and create a real risk for employers of both administrative action and litigation. Fines and penalties, whether assessed by the state or a court, can be steep.

Lastly, as employees increasingly focus on health and benefits as a top priority, it will be important that employers not only ensure they are complying with all necessary laws but consider whether to go above and beyond by providing paid family and medical leave benefits that are more generous than state laws require — or their competitors offer — in order to attract and retain top talent.

As the foregoing makes clear, PFML laws are not going anywhere, and employers will need to pay careful attention to the coverage and requirements in locations where their employees work, engaging counsel as necessary to understand their obligations.

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