DMEC
2026 ANNUAL
CONFERENCE

Putting the "Paid" in Paid Leave – A Rate of Pay Examination

Joshua Seidman, JD – Partner, Seyfarth Shaw LLP

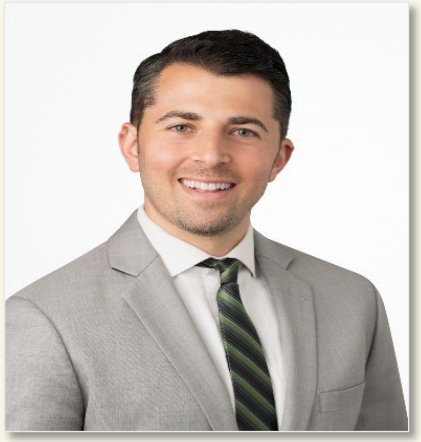
Lynne Sousa, JD – AVP, Counsel, Voya Financial

Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.



Speakers



Joshua Seidman, Esq.
Seyfarth Shaw
Partner
jseidman@seyfarth.com



Lynne Sousa, Esq.
Voya Financial
AVP, Counsel
Lynne.Sousa@voya.com

Program Overview

1. **Terminology and National Overview**
2. **Paid Family Medical Leave (PFML) Laws – Rate of Pay Standards**
3. **Paid Sick Leave (PSL) and PTO Laws – Rate of Pay Standards**
4. **Rate of Pay Considerations When PFML and PSL Overlap**
5. **Questions**



Terminology and National Overview



Terminology

Statutory Unpaid Family and Medical Leave (FML): Provides up to a specified number of weeks of unpaid job-protected leave for eligible employees who take leave for covered reasons, including their own illness, bonding with new child or to care for family member with a serious health condition.

Statutory Disability Insurance (SDI, TDI): Provides partial wage replacement to employees who are temporarily disabled and unable to work because of non-occupational illness or accident.

Statutory Paid Family Leave (PFL): Provides up to certain number of weeks of paid leave for eligible employees who take leave for family care related covered reasons, including bonding with a new child or to care for family member with a serious health condition. This time may also be job-protected in some jurisdictions.

Statutory Paid Family and Medical Leave (PFML): Provides up to certain number of weeks of paid leave for eligible employees who take leave for covered reasons, including their own illness, bonding with a new child or to care for family member with a serious health condition. This time may also be job-protected in some jurisdictions.



Terminology continued

Statutory Paid Sick Leave Law (PSL): Employees earn a certain amount of paid sick leave based on hours worked that can be used for various reasons, including sickness or preventive care for themselves or family members. Employees receive their full pay (with potential nuances) for PSL and they are paid by their employer for the time.

Statutory Paid Personal Time / Paid Time Off Law (PTO): Similar to statutory PSL except that employees can use their earned paid personal time or paid time off for *any reason*.

Company-Provided/Voluntary Leave (STD, LTD, PPL, etc.): Companies may choose to provide voluntary leave benefits to employees such as short-term disability or paid parental leave in order to attract or retain employees



Paid Sick Leave (PSL) and PTO Laws

Total Mandates

As of June 2026:
56 TOTAL PSL & PTO Mandates in the U.S.

- **Why?** Several jurisdictions have enacted multiple mandates.

But number constantly changing due to Sunset or Repeal of Standard Laws.

PEAK (as of Dec. 2020): Approx. 69 TOTAL Mandates in U.S.

Federal

Executive Order 13706
PSL for many EEs of certain federal contractors

Families First Coronavirus Response Act
Emergency PSL for EEs of certain sized ERs (sunset as of 12/31/2020; reimbursement for voluntary leave option for select ERs ended 9/30/2021)



Paid Sick Leave (PSL) and PTO Laws continued

21 States + DC

PSL:

- AK (7/1/25)
- AZ
- CA (amended 1/1/26)
- CO
- CT (amended 1/1/25)
- DC
- MD
- MA (amended 11/21/24)
- MI (amended 2/21/25)
- MN (amended 7/1/25 + 1/1/26)
- NE (10/1/25)
- NJ
- NM
- NY (amended 1/1/25)
- OR (amended 9/28/25 + 1/1/26)
- RI
- VT
- **VA (7/1/27)**
- WA (amended 7/27/25 + 1/1/26)

PTO:

- IL
- ME (amended 9/24/25)
- NV

24 Municipalities

(1) San Francisco, CA; **(2)** Seattle, WA; **(3)** Long Beach, CA; **(4)** SeaTac, WA; **(5)** New York City, NY; **(6)** Los Angeles City, CA; **(7)** Oakland, CA; **(8)** Philadelphia, PA; **(9)** Tacoma, WA; **(10)** Emeryville, CA; **(11)** Montgomery County, MD; **(12)** Pittsburgh, PA; **(13)** Santa Monica, CA; **(14)** Minneapolis, MN; **(15)** San Diego, CA**; (16)** Chicago, IL (PTO/PSL); **(17)** Berkeley, CA; **(18)** Saint Paul, MN; **(19)** Cook County, IL (PTO); **(20)** Westchester County, NY; **(21)** Bernalillo County, NM (PTO); **(22)** Allegheny County, PA; **(23)** West Hollywood, CA (PTO); **(24)** Orland Park, IL (PTO)



Paid Family and Medical Leave Laws

15 TOTAL MANDATORY PFL/PFML LAWS

- **14 States + DC**

  CA, CO, CT, DE, DC, ME, MD, MA, MN, NJ, NY, OR, RI, VA, and WA

2 TOTAL VOLUNTARY PFML LAWS

- **2 States**

  NH and VT

- Note: SDI laws exist in CA, HI, NJ, NY and RI
- Note: AL, AR, FL, KY, LA, SC, TN, TX, VA added Family Leave Insurance as a class of insurance



PFML Laws – Rate of Pay Standards



Amount of Pay-PFML

State	Amount of Benefit Payments
CA PFL	**Percent of Wages:** 70-90% of EE's average weekly wage (AWW) depending on income **Current Weekly Max:** $1,765
CT	**Percent of Wages:** 95% of EE's AWW up to 40x state min. wage, plus 60% of the AWW that is greater than 40x state min. wage up to the weekly maximum benefit **Current Weekly Max :** $1016.40
CO	**Percent of Wages:** 90% of EE's AWW up to 50% of the state AWW plus 50% of the AWW that is greater than 50% of the state AWW up to the weekly maximum benefit **Current Weekly Max:** $1,381.45
DC	**Percent of Wages:** 90% of EE's AWW up to 150% of DC minimum wage and 50% of the AWW above 150% of DC minimum wage **Current Weekly Max:** $1,190.00

Amount of Pay-PFML

State	Amount of Benefit Payments
DE	**Percent of Wages:** 80% of a worker's AWW during the preceding 12 months **Current Weekly Max:** $900.00
ME	**Percent of Wages:** 90% of EE's AWW up to 50% of the state AWW and 66% of the AWW above 50% of the state AWW **Current Weekly Max:** $1,198.84
MD (Benefits begin Jan. 2028)	**Percent of Wages:** 90% of EE's AWW up to the maximum set by the state **Weekly Max for 2028:** $1,000.00
MA	**Percent of Wages:** 80% of EE's AWW up to 50% of the state AWW and 50% of the AWW greater than 50% of the state AWW **Current Weekly Max:** $1,230.39



Amount of Pay-PFML

State	Amount of Benefit Payments
MN	**Percent of Wages:** 90% of EE's wages up to 50% of the state AWW plus 66% of wages that are greater than 50% of the state AWW but less than 100% of state AWW plus 55% of wages above 100% of state AWW **Current Weekly Max:** $1,423.00
NJ PFL	**Percent of Wages:** 85% of a worker's AWW up to maximum weekly benefit amount **Current Weekly Max:** $1,119.00
NY PFL	**Percent of Wages:** 67% of employee's AWW up to the max weekly benefit **Current Weekly Max:** $1,228.53
OR	**Percent of Wages:** 100% of the employee's average weekly wage up to 65% of the state average weekly wage plus 50% of the average weekly wage over 65% of the state AWW **Current Weekly Max:** $1,692.16



Amount of Pay-PFML

State	Amount of Benefit Payments
RI PFL	**Percent of Wages:** 4.62% of employee's wages in the highest quarter of the base period **Current Weekly Max:** $1,103.00
VA (Benefits begin Dec. 2028)	**Percent of Wages:** Either 80% of employee's AWW during the base period or 80% of the employee's AWW in the quarters in which the employee worked if less than 5 quarters, subject to a maximum benefit **Weekly Max:** TBD
WA	**Percent of Wages:** 90% of the employee's average weekly wage up to 50% of the state average weekly wage plus 50% of the average weekly wage above 50% of the state average weekly wage up to the weekly maximum **Current Weekly Max:** $1,647.00



PFML Rate of Pay – Related Considerations

Rate of pay considerations arise in various PFML contexts, including:

- Employee Eligibility
- Definition of "Wages" or "Compensation"
  - Including any required inclusions or exclusions
  - Relevant lookback period (if any)
- Coordination of Benefits (discussed in more detail later in presentation)
- Method of Funding
- Reporting and Remitting



PSL and PTO Laws – Rate of Pay Standards



PSL / PTO Rate of Pay – Background

- Employers often setup discretionary paid time off benefits (i.e., vacation time, personal time, floating holidays, etc.) to be compensated at a non-exempt employee's normal base hourly rate
- **Practical Misstep:** Many employes mistakenly assume that payment of statutory PSL and PTO can be structured the same way
- PSL and PTO laws often appear to have been drafted without a focus on the terminology for the rate of pay → **Employers must exercise caution**
- Compliance requires coordination between an employer's payroll, HR, leave administration, and legal team



PSL / PTO Rate of Pay – Background

- PSL / PTO laws **generally contain four different standards** for the rate at which PSL / PTO might be paid.
- **These include:**
  - **(1) Regular Rate of Pay**
  - **(2) Weighted Average**
  - **(3) Rate in Effect**
  - **(4) Normal Base Hourly Rate**
- There are some variations depending on jurisdiction, including some where the method of pay is **not** clear



Regular Rate of Pay Method

- **General Concept:** Regular Rate of Pay ("RROP") is:
  - The rate used to calculate an employee's overtime premiums (often called the "FLSA rate").
  - Generally calculated over a single workweek by dividing all remuneration for employment (except for statutory exclusions such as overtime pay and paid time off) by all hours worked in the week.
  - Remuneration for employment includes **not just** base wages, **but also** non-discretionary bonuses, commissions, shift differentials, and other similar forms of compensation



Weighted Average Method

- **Ties to RROP:** Closely analogous to the regular rate of pay.
- **Overtime Context:** The weighted average approach is a more broadly accepted approach than the rate in effect method for calculating a non-exempt (i.e., overtime eligible) employee's overtime rate of pay in a week during which he or she works at two or more rates of pay.
- **Method:** Under this approach, an employee's rate of pay for determining overtime pay is calculated by adding all hours worked in the week and dividing that number into the total compensation for the week



Regular Rate of Pay / Weighted Avg. – Select Examples

- Alaska
- California
- Maine
- New Jersey (variable pay)
- New York
- Washington State (variable pay)

Rate in Effect Method

- **General Concept:**
  - Overtime Context: Method for determining the overtime rate employees who are paid at multiple rates of pay for varying types of work within a workweek—the "rate in effect" means that the employee's overtime rate is calculated based on the rate in effect when the employee worked the overtime hours.
  - PSL Context: Means that the employee is paid at the rate they would have earned had they worked the hours rather than taking them as PSL.
- **Sub-Categories:**
  (1) "true" rate in effect

  (2) "potential" rate in effect

  (3) rate in effect with key permissible exclusions



Rate in Effect Method – Select Examples

- **Arizona**
- **Maryland**
- **Nevada**
- **Vermont**
- **Washington**
- **Washington, D.C.**



Normal Base Hourly Wage Method

- **General Concept:** Normal base hourly rate generally refers to the straight-time hourly rate that an hourly employee is regularly paid during non-overtime hours.
- **Select Examples:**
  - **Illinois**
  - **Michigan**



PSL / PTO Rate of Pay – Related Considerations

- Salaried Exempt Employees
- Written Policy Requirements
- Balance Notification / Paystub Notice Requirements
- Timing of Pay
- Payout at Separation



Rate of Pay Considerations When PFML and PSL Overlap



Recap – PFML vs. PSL Rate of Pay

Law Type	Amount of Pay
PFML Laws	Varies greatly jurisdiction by jurisdiction
	67% of the employee's average weekly wage, depending on the employee's income, to as high as 100% of the employee's average weekly wage (up to a certain amount)
	Maximum weekly payments also vary greatly—as low as $900 to as high as $1,765 in CA
PSL Laws	Generally, 100% pay BUT rate of pay standards vary by jurisdiction – complicated especially for non-exempt employees



Coordination of Benefits - PFML

- Some laws are ambiguous or silent.
- Coordination with **"time off" benefits** (i.e., PTO, paid sick leave, vacation, etc.) **versus** **"leave" benefits** (i.e., parental leave, STD, etc.).
- Coordination involves multiple layers, including **(a)** determining whether the statutory leave and company-provided benefit can be run concurrently, and **(b)** assessing how the leave will be compensated (i.e., will the time off be fully paid at 100% normal wages; what amount of pay will come from the statute versus company policy; is there a reimbursement component, etc.)
- **Significantly, coordination with paid time off benefits typically involves restrictions on employers' ability to run company-provided leave concurrently with statutory PFML.**
    - **Instead, if employer allows, employees then can choose whether to use available company-provided paid time off to "top off" statutory PFML**



When Employee Chooses to "Top Off" PFML with Statutory PSL / PTO

- PFML typically only pays a % of an EE's weekly comp subject to caps.
  - weekly comp calculations vary by state.
- PSL/PTO can, sometimes, be used to supplement PFML.
  - Significant state-by-state variation in allowance/requirement/prohibition.
- Different Forms of Pay/Different Groups of Employees – each raises different questions
  - Salaried non-exempt, hourly, variable bonuses, multiple jobs at different rates in same pay period, etc.
  - Calculate gap based on formula state PFML uses (avg weekly wage, often)? Other?
    - State or local PSL often paid at lower rate than PFML calculation, so PSL use as top off may result in under-replacement of wages.



Wage & Hour Litigation Risk

LINK TO SEYFARTH 2025 W&H LITIGATION REPORT

https://www.seyfarth.com/dir_docs/brochure/2025-FLSA-Litigation-Metrics-and-Trends.pdf

Ex. 1 – ER uses FLSA rate instead of weighted average state law requires, undercalculating PSL for hourly EEs by average of $2/hr for avg of 40 hrs/year for class of 10,000 current and former EEs. FLSA and state law claims asserted. 3 year SOL, liquidated damages available. Exposure = $4,800,000 + attorney's fees.

Ex. 2 – New York ER miscalculates PSL by $3/hr. 10K current and former employees affected on avg 40hrs/year. FLSA and NYLL claims brought. ***6*** year SOL for NYLL claims, liquidated. $14,400,400 + fees.

Practical Considerations

- W&H audits
- Pay codes
- How are EEs paid?
- Pay standards for PSL vs. PFML in different jurisdictions
- How does ER coordinate PFML and PSL/PTO currently?
- **Goal = do not underpay EEs, do not over or under deduct PSL**



Final Thoughts



Seyfarth Paid Leave Resources

If you're struggling with or have questions about the country's Paid Leave "Patchwork" here are some ways Seyfarth can help:

(A) PFML & PSL Surveys: Seyfarth maintains ***comprehensive PFML & PSL surveys*** breaking down the specific requirements of ***each*** existing state and local PFML and PSL law.

For more information contact: paidleave@seyfarth.com

(B) Paid Leave Mailing List: Seyfarth regularly publishes Legal Updates and Blog Posts on PFML/PSL and other paid leave law developments.

You can sign up here:
https://communication.seyfarth.com/9/7/landing-pages/subscription.asp



Seyfarth Paid Leave Resources (con't)

(C) Webinar Series – Guidance on PSL & PFML: Seyfarth hosts two separate webinar series—one on PFML and another on PSL.

(D) "Take It or Leave It" Podcast: In late 2021, Seyfarth launched a podcast focused exclusively on workplace leaves, absence management, and accommodations. **50 episodes** streaming on Spotify, SoundCloud, and Apple Podcasts, and available on Seyfarth's website.

More info at:
https://www.seyfarth.com/trends/take-it-or-leave-it-podcast.html

Questions?



thank you

For more information please contact:

Joshua Seidman
Email: jseidman@seyfarth.com

Lynne Sousa
Email: lynne.sousa@voya.com

