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New York Revises Proposed Regulations for Paid Family Leave and Sets Premium Rates

Last year, New York enacted a comprehensive paid family leave law that will provide employee-funded benefits administered through the state's temporary disability insurance program. On May 25, the New York Workers' Compensation Board proposed revised regulations to phase in the new benefit that contain important changes and clarifications. On June 1, the state set the premium rate for PFL benefits and maximum employee contribution for coverage beginning January 1, 2018. Employers should continue to follow the rulemaking process, and consider how best to integrate the new entitlement into their leave programs and payroll practices.

Background

On April 4, 2016, New York enacted the Paid Family Leave Law (PFL), effective January 1, 2018. When fully phased in by 2021, the PFL program will provide eligible employees with up to 12 weeks of paid leave benefits in a 52-week period to: care for a family member with a serious health condition; bond with a newborn, adopted or foster child; or deal with a qualifying exigency arising from a family member's active military duty. PFL benefits will be employee-funded and administered through the state's temporary disability insurance (TDI) program. (See our April 26, 2016 *For Your Information*.)

On February 22, the New York Workers' Compensation Board issued proposed regulations to implement the new leave benefit and later posted FAQs. (See our March 29, 2017 *For Your Information*.)

Revised Regulations Proposed

On May 24, the Board proposed revised regulations with a 30-day comment period that extends until June 23. Key changes and clarifications are highlighted below.

Definitions

The revised regulations define "wages" more broadly to include tips or gratuities if they customarily constitute part of the job's pay. The initial proposal limited wages to the pay rate plus the reasonable value of board, rent, housing or similar contractual provision.

Notably, the revisions maintained the originally proposed definition of "family member," which has a broader meaning than under the federal Family and Medical Leave Act (FMLA). For FMLA purposes, a qualifying family member is a spouse, child, or parent, while the term for PFL purposes includes a child, parent, grandparent, grandchild, spouse, or domestic partner.

Eligibility

The revised regulations make clear that the PFL does not cover independent contractors, certain livery drivers and "black car operators," clergy and ministers, persons "engaged in a professional or teaching capacity in or for a religious, charitable or educational institution," and other specified individuals.

Notably, the revisions eliminate the distinction between full-time and part-time employees, and base eligibility for PFL benefits on a 20-hour – rather than a five-day – workweek. Under this clarification, an employee who regularly works at least 20 hours per week will be benefit eligible after 26 consecutive work weeks, while an employee whose regular schedule is for fewer hours will be eligible after working 175 days. Employees who will not satisfy those criteria will be allowed to file a waiver of PFL benefits, allowing them to avoid providing weekly contributions.

> **Comment.** Although the revisions removed language stating that work performed outside the state would count as time worked for eligibility purposes, such work is already counted toward eligibility under the workers' compensation law.

Using Leave

The revised regulations clarify that the maximum period of paid family leave for an employee who takes it in daily increments will be calculated based on the average number of days the employee works per week, capped at 60 days per year for employees who work at least five days per week when PFL benefits reach a maximum of 12 weeks in 2021. Employees who work less than five days per week will be eligible for a prorated number of days based on their regular employment schedule. Employees taking paid family leave in weekly increments will be eligible for the maximum number of weeks of leave in a 52 consecutive week period.

Notice

The revisions alter the employee notice requirements for intermittent PFL. While the proposed regulations only required employees to give a one-time notice of the need for intermittent leave at the start of PFL, the revised regulations would allow employers to require notice as soon as practicable before each day of intermittent leave.

Interplay with FMLA and Other Available PTO

The revisions confirm that leave taken for an employee's own serious health condition under the FMLA does not reduce the amount of the employee's PFL entitlement in the same 52 consecutive week period. However, as both the PFL and proposed regulations made clear, an employee is limited to a combined total of 26 weeks of statutorily required disability and PFL benefits during the same 52 consecutive week period. As the revisions also make clear, an employer may count against an employee's PFL entitlement leave it designates as FMLA-covered if it notifies the employee of his or her PFL eligibility, regardless of whether the employee applies for payment.

> **Comment.** Because the effective date of the PFL is January 1, 2018, leave taken pursuant to company policy prior to that date will not count against the employee's maximum PFL benefit. Rather, an employee may take an additional eight weeks of leave in 2018 for a PFL qualifying reason, such as baby bonding.

When an employee takes PFL leave for an FMLA-qualifying reason, the proposed revisions would allow an FMLA-covered employer to designate PFL leave to run concurrently with FMLA and follow FMLA rules on the use of accrued but unused time off. If designated accordingly, an employer may charge an employee's accrued paid sick, personal or vacation time off in accordance with FMLA provisions. Absent such designation, an employer may not require an employee to use such time, but an employee may choose to do so to receive full salary during leave.

Notably, the revised regulations did not address the interplay between the PFL and the New York City Earned Sick Time Act, which provides up to 40 hours of paid sick leave to eligible New York City employees. (See our March 18, 2016 *For Your Information*.) Pending further guidance, it is unclear whether employees will be entitled to paid time off under the NYC law as well as PFL, or leaves under those two laws may run concurrently.

Interaction with Collectively Bargained Benefits

Under both the initial and revised regulations, an employer that provides paid family leave benefits under a collective bargaining agreement (CBA) is relieved from providing PFL benefits if the CBA's benefits are at least as favorable as the PFL's. The initial proposal allowed (CBAs) to provide PFL-related rules that differ from the regulations, subject to prior approval, and the revised regulations contain several examples of permissible CBA rules. The revised regulations allow employees to establish collectively PFL benefits eligibility through actual time worked at any employer covered by the CBA, provided the period is no greater than 26 consecutive workweeks or 175 days. They also allow the CBA to make the union, acting as the employer, responsible for all time records and payroll deductions related to the administration of PFL.

Claims

The revisions make slight timing changes with respect to denial of PFL. Although they still allow payment of PFL benefits by payroll debit cards and direct deposit, the revised regulations remove specific rules for payroll debit cards, likely in light of ongoing litigation over state wage payments rules. (See our May 11, 2017 *For Your Information.)*

Reinstatement Complaints

Regulations that were initially proposed required an employee who was not reinstated after PFL to file a formal reinstatement request with the Workers' Compensation Board within 120 days as a condition precedent to bringing a discrimination claim with the Board. The employer's response to the request (or expiration of the period within which to respond) started the two-year statute of limitations period to file a claim running. While the revised regulations eliminated the 120-day requirement for filing a formal request, it did not change the formal reinstatement request or the trigger for the limitations period.

Premium Rates Set

The Department of Financial Services (DFS) was charged with determining, in consultation with the chair of the Workers' Compensation Board, whether PFL benefits coverage should be experience rated or community rated subject to a risk adjustment mechanism. On May 31, DFS adopted final regulations governing the content and sale of policy forms for PFL benefits coverage and establishing the statewide community rate for premiums – which is

also the maximum employee contribution to the program regardless of whether benefits are provided by an issuer or a self-funded employer. The regulations apply to issuers (including the state insurance fund) and self-funded employers alike, with the exception of the risk adjustment provisions that apply only to issuers.

On June 1, DFS issued a decision on the premium rate for PFL benefits and maximum employee contribution for coverage beginning January 1, 2018. For calendar year 2018, the maximum premium rate and the weekly employee contribution will be 0.126% of an employee's average weekly wage capped at the state's average weekly wage – currently $1,305.92. Premiums for employees whose income is at or above the statewide average weekly will be a percentage of the statewide average weekly wage, while premiums for employees who earn less than the statewide average weekly wage will be based on their actual income. Employers may – but are not required to – begin collecting employee contributions starting July 1 for the 2018 benefit year.

In Closing

The proposed revised regulations, which contain important changes and clarifications, are open to public comment until June 23. Employers will want to familiarize themselves with the regulations as they are being finalized, and consider how best to integrate the new entitlement into existing leave programs and payroll practices.

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