

Summary of Assessment of Public Comment on Revised Proposed Regulations (5/24/17)

The Chair and Board received approximately 58 formal written comments. Approximately 22 of those were form letters from employee advocacy groups. All of the comments received were reviewed and assessed. The full Assessment of Public Comment summarizing, analyzing, and responding to the comments received exceeds 2,000 words. This document is a summary of the full Assessment of Public Comment. A copy of the full assessment is posted on the Board's website at wcb.ny.gov.

The Board received multiple comments asking for employers not to be required to provide paid family leave benefits to employees who do not live and work in New York. Section 203 of the WCL requires employees in the employment of a covered employer to be provided paid family leave benefits. Section 201(6)(B) and (C) of the WCL controls when an employee is in employment for the purpose of Article 9 of the WCL. Employees who work in New York State, with only incidental work outside the state, are covered. If an employee works in another state, and only incidentally works in New York, they are not in covered employment. If an employee does not perform his or her work in any other single state, he or she is in covered employment if some of his or her work is performed in New York and the employee is either: (1) based in New York; (2) controlled from New York; or (3) the employee lives in New York. (WCL § 201(6)(C)). The Board will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage. Because the criteria for covered employment is set forth in statute, it cannot be changed by regulation. Accordingly, no changes to the regulations has been made.

The Board received a comment concerned that employees who have a qualifying event, such as the birth of a child, in 2017 may be able to take leave under their employer's policies in 2017 and then take paid family leave in 2018. Section 204(2) of the WCL states the amount of paid family leave employees are entitled to after January 1, 2018, and section 201(15) of the WCL permits employees to take leave to bond with a child anytime during the first 12 months after the child's birth. The Board cannot change the statutory benefit. Starting in 2018, periods of federal FMLA leave for the same qualifying event will usually run concurrently with paid family leave under section 205(2)(c) and 206(4) of the WCL as well as section 380-2.5(g) of the proposed regulations. Accordingly, no change to the regulations has been made.

The Board received a comment asking whether employers are required to begin employee deductions on July 1, 2017. The Board responded to a similar question in the assessment of public comment published on May 24, 2017, "section 380-2.4(d) is permissive in allowing, but not requiring employers to begin taking deductions on July 1, 2017." Accordingly, no change to the regulations has been made.

The Board received a comment requesting clarification in the regulations if 380-2.5(b) permits employees who work less than 20 hours per week to take leave after working 175 days, or after 175 calendar days of employment. Since the section states an employee is eligible to take leave after "working 175 days in such employment," it means after the 175th day worked. The Board believes the language as written is sufficient, so no change to the regulations is required.

The Board received a comment which asked for section 380-2.5(d) to clarify if paid time off in which employee deductions were made count toward an employee who works less than 20 hours per week's eligibility. The paragraph currently states such time is "counted as consecutive weeks, consecutive work weeks" The sentence has been changed to clarify that paid time off in which deductions have been made also counts toward the number of work days necessary for employees who work less than 20 hours per week to be eligible to take leave.

The Board received a comment concerned that the calculation of an employee's average daily rate of pay for intermittent leave under section 380-2.5(c)(3) could reduce an employee's pay if the week the employee goes on leave is counted. This section has been amended to state the conversion from average weekly wage should be done using the same time period used in calculating the average weekly wage under section 355.9(2), which permits the 8 week period to exclude a final partial week.

The Board received a comment asking for section 380-2.5(c)(3) to clarify if an employee's average daily rate should be calculated using a fractional average number of days per week worked. Yes, this section has been updated to clarify that average number of days worked per week can include fractions in order to accurately convert an employee's average weekly wage to average daily wage.

The Board received a comment asking for section 380-2.5 to clarify whether an employee that acquires eligibility and is seasonally laid off has to fulfill an eligibility period again when they are rehired. Section 203 of the WCL states an employee who completes 26 consecutive weeks of employment can take an unpaid leave of absence with the employer's agreement and immediately become eligible for leave upon their return. Accordingly, no change to the regulations has been made.

The Board received a comment which requested clarification for section 380-2.6(a) – whether employers are required to provide the option of the waiver or whether it is permissive. This subdivision has been amended to state employers "shall" provide employees who qualify the option to sign a waiver, rather than "may."

Three comments asked for the time period for calculating employees' maximum amount of paid family leave to match the FMLA. Section 380-2.8 states that the 52 consecutive week period for calculating an employee's maximum paid family leave duration is computed retroactively for each day leave is claimed. The FMLA gives employers four different choices for calculating the 12 month period for employees' maximum leave, including a rolling 12-month period measured backward from the date an employee uses leave (29 CFR 825.200(b)). If an employer uses calendar year periods for FMLA leave, their employees may already be able to stack leave by taking leave at the end of one year and begging of another. Employers can choose to use similar rolling lookback methods for calculating employees' maximum paid family leave and FMLA leave. Accordingly, no change to the regulations has been made.

A comment asked for section 380-2.9 to be amended to add more protections to ensure all employees covered by a collectively bargained plan are provided paid family leave benefits at least as beneficial as those required by Article 9 of the WCL. Section 211(5) of WCL permits the Board to accept a collectively bargained plan and relieve an employer of their obligation to provide paid family leave benefits under Article 9. 12 NYCRR Subpart 358-3 describes the

approval process before a plan is accepted. The Board has also amended section 380-2.9 to clarify paid family leave in conjunction with collective bargaining agreements.

The Board received a comment from insurance carriers expressing concern with the requirement that carriers provide employees who pre-filed a claim a confirmation of receipt of the completed claim within one business day, because many insurance companies will find it impossible to process information and determine whether the claim is complete in one day. Section 380-5.3(b) requires carriers to send a list of the items necessary to complete the pre-filed claim within 5 days of receiving the request for paid family leave. After a carrier sends the list and the employee responds, the carrier needs to check if what has been received is the missing item. Because of time necessary to process incoming mail and for a person to verify the item received was what was requested, section 380-5.3(b)(4) has been amended to give carriers three days to acknowledge receipt. The 18 days to pay or deny the claim runs from the day of receipt.

The Board received two comments asking for section 380-7.2(b) to clarify what employers can use the employee contribution for, and what surplus contributions are. The Department of Financial Services sets the maximum employee contribution annually pursuant to section 209(3) and (5) of the WCL. It must be no more than an employee's share of the paid family leave coverage premium amount set under section 4235(n)(1) of the Insurance Law. Section 380-7.2(b)(3) states employers shall use their employees' contributions to provide paid family leave benefits, which means to pay for a policy or self-insure in accordance with 12 NYCRR Part 361. Section 380-7.2(b)(3) requires employers to return to their employees any surplus amount withheld that exceeds the actual cost of the paid family leave policy, to comply with section 209(5) of the WCL. The Board has determined no changes to the regulations are required.

The Board received several form letter comments which asked for Subpart 380-7 to be amended to make employers who do not provide health insurance coverage to employees on paid family leave liable to their employees for the employees' medical costs while on leave. An employers' cancellation of health insurance in violation of section 203(c) of the WCL may be grounds for a discrimination claim under section 120 of the WCL, but there is no separate penalty provided for by statute. Accordingly, no change to the regulations has been made.

The Board received a comment from a contractors association taking issue with the reinstatement provisions of the revised proposed regulations. Because reinstatement is included in the statute at section 203-b of the WCL, this cannot be removed by regulation. Therefore, no change to the regulations has been made.

The Board received several form letters which asked for a provision to be added to the proposed regulations explicitly stating that nothing in the regulations reduces or infringes on employee's rights under any other law, including New York's Human Rights Law. The Workers' Compensation Board does not have jurisdiction over other areas of law outside of the Workers' Compensation Law. An employee may have a variety of state or federal claims based on a set of circumstances that gives rise to a paid family leave discrimination claim, but it is beyond the scope of the regulations to say what effect a paid family leave discrimination determination would have under other areas of law. Accordingly, no change to the regulations has been made.

The Board received a comment suggesting that section 380-9.10(c) measure the 10 days for payment from date filed rather than service to be consistent with other areas of the Workers' Compensation Law. The Board agrees, and has made this change.

The Board received several form letters commending the changes in the republished proposed regulations which removed the 120-day filing requirement in section 380-8.1 for formal requests for reinstatement, clarified a period of leave for an employee's own disability under the FMLA does not count toward their maximum amount of paid family leave in section 380-2.5(g)(4), and requires insurers state the basis for the denial of a paid family in section 380-5.4(a)(a).

The Board received several comments from small employers and individuals expressing concerns about the adverse effect of paid family leave on small employers. As addressed in the previous Assessment of Public Comment, "the statute defines a covered employer as one with one or more employee, and this cannot be modified by regulation." Therefore, no change has been made.