

Assessment of Public Comment on Revised Proposed Regulations

The Chair and Board received approximately 58 formal written comments. Approximately 22 of those were form letters from employee advocacy groups.

Definitions (section 355)

The Board received a comment asking for the regulations to specify when an employee is considered a farm laborer and not required to be covered by disability and paid family leave benefits. There is no change to the statutory definition of covered employment in section 201(6) of the Workers' Compensation Law (WCL). The Board's website provides several examples of exempt farming activity, and additional examples may be provided as they arise. Accordingly, no change to the regulations has been made.

A comment requested that section 355.9(a)(8) of the proposed regulations be changed to clarify that the definition of fifty two consecutive weeks applies throughout the paid family leave regulations. Paragraph (a) of section 355.9 states the definitions contained in the section apply throughout Part 380. Accordingly, no change to the regulations has been made.

The Board received a comment requesting section 355.9(5) be changed to clarify that a day of paid family leave is not a day of leave due to the employee's own illness or disability. Section 201(15) of the WCL states that family leave only includes leave to care for a family member, to bond with the employee's child, or because of a qualifying military exigency of a family member. Accordingly, no change to the regulations has been made.

A comment asked for section 355.9(5) to say whether a day where the employer is shutdown or closed counts as a day of paid family leave if it falls during the period of an employee's request. Section 355.9(5) states a day of leave can include any day the employee was prevented from working because they used family leave. The section provides additional guidance to sections 204 and 206 of the WCL. A day in which the employer is closed is still considered a day of paid family leave, because the employee is not working because of scheduled paid family leave. Accordingly, no change to the regulations has been made.

A comment indicated concern that section 201(15)(c) of the WCL misidentifies the Code of Federal Regulation section that provides guidance on what situations are qualifying military exigencies. Section 280-2.3 of the proposed regulations refers to the correct section, 29 CFR 825.126(b). Accordingly, no change to the regulations has been made.

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 asking the proposed regulations to be amended to allow employers to include out-of-state employees in their New York disability and paid family leave policies. The WCL defines New York employees, employers, and employment. The Board does not have the authority to regulate the employment or insurance of out-of-state employees that are not covered by section 201(6)(c) of the WCL. The state where the out-of-state employees are employed may have its own disability or paid family leave requirements, and has its own insurance law and regulations governing policies. Employers may cover their out-of-state employees with a disability policy governed by that state's law, or choose to give paid time off for family leave under its own leave policies. Accordingly, no change to the regulations has been made.

The Board received comments asking for temporary workers and college students to be excluded from paid family leave. The Board responded to similar comments in the assessment of public comment published May 24, 2017: "When an employer and employee know at the date of hire that the employee's schedule will not allow them to become eligible for PFL benefits in a reasonable amount of time, it is detrimental to the employee to require them to contribute to coverage. . . .Hence, a seasonal worker hired for only 12 weeks can waive coverage, as could an individual who works 1 day a week." And "college student workers are covered by Article 9 of the WCL, but may sign a waiver if they meet the requirements of section 380-2.6." Accordingly, no change to the regulations has been made.

Eligibility (Subpart 380-2)

The Board received a comment asking for section 380-2.1 to be amended to specify for caregiver leave what constitutes "arranging for a change in care" or "close and continuing proximity." The Board responded to similar comments in the assessment of public comment published May 24, 2017: "The Board has reviewed these comments and determined that the current language adequately conveys the principle that the employee must be in the same general location as the family member receiving their care. The purpose of the current language is to ensure caregivers have the flexibility to perform those activities outside of the family member's presence, but which are reasonably related to providing them care. The list of caregiving activities is not intended to be exhaustive." Accordingly, the Board has determined no changes to the regulations are required.

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 asking that the regulations clarify employer’s obligations concerning notice to their employees of the deduction. The statute does not require notification of deductions to employees. Accordingly, no change to the regulations has been made.

The Board received a comment asking if the Board intended to not permit an employee to take leave due to a grandparent or grandchild’s qualifying military exigency under section 380-2.3. Section 201(15)(c) only permits paid family leave for a qualifying military exigency arising out of an employee’s spouse, domestic partner, child, or parent’s military service. Because the covered family members for military exigency leave is set forth in statute, it cannot be changed by regulation. Accordingly, no change to the regulations has been made.

The Board received several form letter comments asking that section 380-2.4(d) be amended to clarify that employers cannot use withheld employee contributions for any purpose other than to provide paid family leave benefits. Section 380-7.2(b)(3) already states employers shall use employee contributions to provide paid family leave benefits and that any surplus must be promptly returned. Accordingly, no change to the regulations has been made.

The Board received a comment which asked for section 380-2.4(b) to clarify how carriers can find out if an employee took leave from a previous employer. Section 380-2.4(b) states employees are entitled to the maximum amount of leave specified by section 204 of the WCL, even where the employee begins employment with a second employer. Section 380-7.2(b) permits carriers to “coordinate efforts to create an electronic portal in order to file and administer claims for paid family leave and in order to coordinate benefits.” In addition, because of the 26 continuous weeks or 175 days of work eligibility periods, it will be difficult for an employee to intentionally take leave from one employer, quit, begin work for a second employer, establish eligibility, and then take another leave for the qualifying event. Accordingly, no change to the regulations has been made.

The Board received a comment asking for the regulations to be amended to consolidate the provisions relevant to an employee taking paid family leave after collecting disability benefits for childbirth (sections 380-2.2(c), 380-2.4(c), 380-2.5(f)). Subpart 380-2 covers whether an employee is eligible to take paid family leave in a variety of circumstances. Section 380-2.2, “Leave for birth, adoption, or foster care,” states in paragraph (c) that an employee can collect both disability benefits and paid family leave in the post-partum period, but not at the same time. Section 380-2.5, “Employees Who Acquire Eligibility During Employment,” in paragraph (f) limits employees to a combined 26 weeks of disability benefits and paid family leave, which

could have been taken for any qualifying reason. The Board has added this topic to the published answers to frequently asked questions on the program's webpage. The Board has determined no change to the regulations is required.

The Board received a comment that requested section 380-2.5(a)(2) clarify what it says about employees establishing eligibility through 26 consecutive weeks of day to day hiring. The section is based on the text of section 203 of the WCL. It only clarifies that employees who are hired day to day, if that is the usual practice of the trade or business, can still establish eligibility by working for an employer for 26 consecutive weeks. 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.

A comment asked for the regulations to clarify whether employees who work less than 20 hours per week become eligible for paid family leave after 175 days of work, even if those days are not worked in a 52 week period. Section 380-2.5(b) states employees who work less than 20 hours per week become eligible for paid family leave after working 175 days. Only those employees that do not work 175 days in a 52 consecutive week period are permitted to complete a waiver of paid family leave benefits under section 380-2.6. The Board will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage. Accordingly, no change to the regulations has been made.

The Board received several comments requesting section 380-2.5 be amended so that employees who work 30 (or alternatively, 37.5 or 40) or more hours per week become eligible for leave after 26 consecutive weeks of employment, and those who work less become eligible after 175 days of work. As stated in the assessment of public comment published May 24, 2017: "The Board recognizes the importance to employers and employees of knowing from the start of employment which eligibility standard will be applied, and that it not exclude employees who work full but irregular schedules." Both employees who work more or less than 20 hours per week can take paid family leave once they become eligible. The 20 hours is only used to determine which of the two eligibility periods stated in section 203 of the WCL apply. By applying the 26 consecutive weeks of employment standard for most employees in regular employment, employees, employers, and insurance carriers will be able to easily determine if an employee is eligible at the time leave is requested. Accordingly, no change to the regulations has been made.

A comment asked whether section 380-2.5(c)(2) intended to limit the maximum number of days of intermittent leave to 60. The section limits employees to 60 days of intermittent leave if they work 5 or more days per week. Accordingly, no change to the regulations has been made.

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.

A comment asked for section 380-2.5(f) to clarify that periods of disability leave taken in 2017 count toward an employee's maximum duration of disability benefits and paid family leave in a 52 week period. Section 380-2.5(f) references section 355.9's definition of 52 week period, which says it is computed retroactively from each day the leave is requested. This will go back into year 2017 during year 2018. The Board will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage. Accordingly, no change to the regulations has been made.

A comment asked for section 380-2.5(g)(2) of the proposed regulations to be deleted because it allows employees to have paid family leave that is not concurrent with FMLA leave without the employer's permission. The paragraph states that an employer that does not provide an employee the FMLA notice required by 29 CFR 825.301 has permitted the employee to use paid family leave separate from FMLA leave. If an employer elects to not designate a period of time off FMLA leave pursuant to the governing federal regulations, it is not a period of FMLA leave, and the employer has permitted the employee to use only paid family leave. Accordingly, no change to the regulations has been made.

The Board received several forms letter comments which asked for section 380-2.5 to be amended to provide specific guidance on how the eligibility criteria are applied to employees with irregular work schedules. Section 380-2.5(a) and (b) of the regulations base the eligibility criteria on whether an employee's regular employment schedule is more or less than 20 hours per week. An employee's regular employment schedule depends on the facts and circumstances of the employment setting. The Board will add additional examples as they arise to the published

answers to frequently asked questions on the program's webpage. 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.”

A comment asked for employers to be able to automatically waive the paid family leave deduction and benefits for employees who will not work 26 consecutive weeks or work 175 days. It is the employee's choice whether to complete a paid family leave waiver under section 380-2.6, not the employer's choice. Accordingly, no change to the regulations has been made.

The Board received a comment which opposed allowing any employee to complete a waiver. The Board responded to similar comments in the assessment of public comment published May 24, 2017: “When an employer and employee know at the date of hire that the employee's schedule will not allow them to become eligible for PFL benefits in a reasonable amount of time, it is detrimental to the employee to require them to contribute to coverage. Once the employer becomes aware of a change in the employee's schedule that would result in the employee becoming eligible for PFL, the employer is required to notify the employee and required to begin deducting contributions, including any retroactive deductions necessary to prevent the employer from paying for the coverage. An employee is never required to waive coverage.” Section 218 of the Workers' Compensation law is titled “§ 218. Disability benefit rights inalienable” and was not amended in 2016 to refer to paid family leave. Accordingly, no change to the regulations has been made.

A comment from an employer asked for the paid family leave eligibility criteria to match the FMLA. The Board responded to similar comments in the assessment of public comment published May 24, 2017: “Because the eligibility criteria for Paid Family Leave is set forth in statute under section 204 of the WCL, it cannot be changed in regulation.”

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.

The Board received a comment which requested the regulations alter the definition of child to be limited to only minor children to match the FMLA. Section 201(16) of the WCL defines child, and it does not limit it to minor children. Accordingly no change has been made to the regulation.

The Board received a comment which asked for employer permission to be required before an employee takes intermittent leave, and that two parents working for the same employer be limited to a combined 12 weeks of paid family leave, to match the FMLA. Section 204(b) of the WCL permits each eligible employee to take paid family leave up to the maximum benefit. No exception is permitted for married employees with the same employer except that the employer may limit the employees from taking leave at the same time for the same family member. Eligibility may not be changed by regulation. Accordingly, no change to the regulations has been made.

The Board received a comment which asked for the FMLA rules for substituting leave accruals to apply when a period of paid family leave is also covered by the FMLA. Section 380-6.2(c) states “[a]n employer covered by the FMLA (29 U.S. Code Chapter 28) that designates a concurrent period of family leave under section 380-2.5(g) of this Part may charge an employee’s accrued paid time off in accordance with the provisions of the FMLA.” Accordingly, no change to the regulations has been made.

The Board received a comment which asked for section 380-2.5(g)(3) to be amended to say if an employer “or insurance carrier” informs an employee of their eligibility for paid family leave during FMLA leave, the period can be counted toward the maximum leave in a 52 week period. An employer designates a period of FMLA leave, thus the employer would be responsible for informing an employee of their right to apply for paid family leave benefits during that period. The carrier may not shorten its obligation to provide paid family leave, because the same employee took unpaid FMLA prior to a family leave period. 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 when an employer will be relieved of supplying paid family leave pursuant to a collective bargaining agreement.

Notice (Subpart 380-3)

The Board received a comment which believed section 380-3.5 should be amended to prohibit carriers from partially denying payment of benefits when an employee does not give their employer notice of foreseeable leave. The Board responded to similar comments in the assessment of public comment published May 24, 2017: “[a]s Section 205(5) of the WCL requires employees to give 30 days of notice to employers of foreseeable family leave. . . . Under section 380-3.2, the notice does not have strict technical requirements, and an employee need only give the reason and timing of the leave. As an enforcement mechanism, if an employee does not give his or her employer 30 day notice of foreseeable leave, or the shorter amount of notice required by the employer’s policies, the employer may inform the carrier and the carrier can

issue a partial denial of leave of up to up to 30 days from the date on which notice was given under section 380-3.5. The Board has reviewed these comments and determined that no change to the regulations is required.”

Certifications (Subpart 380-4)

The Board received a comment which asked for the wording of section 380-4.4 to be gender neutral and 5 form letter comments which asked for *in loco parentis* to be defined consistent with the FMLA. Section 380-4.4(a) applies to birth mothers and permits the use of medical documentation to support a bonding certification. Section 380-4.4(b) lists the broad range of documents or combinations of documents accepted to support a certification by any parent other than a birth mother. *In loco parentis* is not defined in the Worker’s Compensation Law. Section 380-4.4(b)(4) states other documentation may be acceptable to show a parental relationship. The Board will add additional examples as they arise to the published answers to frequently asked questions on the program’s webpage. Accordingly, no change to the regulations has been made.

The Board received a comment which recommended removing “or to care for a covered service member (military caregiver leave)” from the title of section 380-4.2. The title of section 380-4.2 has been changed to remove the wording.

Payment and Denials (380-5)

The Board received a comment from organization representing insurance carriers regarding 380-5.2 as an alternate method of filing a claim, in which case the Board’s form would not be used. The Board agrees that because a format other than what’s prescribed by the Chair would be used in this section, “request for paid family leave” should not be capitalized, and the regulations have been updated to clarify this.

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 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.

Insurance carriers submitted a comment opining that the rule that the carrier has 18 days to pay or deny a completed claim, and that the failure of the employer to complete the employer section is not a valid basis for denial are inconsistent. The Board does not agree that these sections are inconsistent, and an employee should not be penalized if his or her employer refuses to complete the employer section. Accordingly, no change has been made.

The Board received a comment expressing concern about 12 NYCRR 380-5.4(d)(7) allowing denial of a claim because the employee requesting leave is the perpetrator of domestic violence

or child abuse against the care recipient. This provision in the regulations represents the only opportunity to deny a claim for cause, and therefore no change has been made.

The Board also received a comment from insurance carriers expressing concern about section 380-5.4(h) explaining that many carriers do not have the capability to communicate in foreign languages. The Board received similar comments in the previous version of the proposed regulations, and amended the language to require all reasonable efforts to communicate in the preferred language of the employee, so no change has been made.

The Board received a comment from insurance carriers requesting that if race or ethnicity is not provided on a form, they may still consider a claim. Because race or ethnicity is an optional field, and this is already the case, no change to the regulations has been made.

The Board received a comment from insurance carriers asking for the five days to be changed to five business days for payment when the carrier receives a completed request more than 18 days before the qualifying event. Because the carrier will, in this instance, have more than 18 days to pay or deny the claim (the only missing information would be the actual start date), no change has been made.

The Board received comments from two associations expressing concern with the payment provisions still in this version of the regulations. Specifically, these associations did not agree with carriers being required to provide a list of ATMs in reasonable proximity, because the location of ATMs is constantly in flux and the carrier has no control over it. The Board has amended section 380-5.6(e) to reflect that the locations of ATMs may change.

The association also commented that requiring a statement that employees may not be charged fees for services necessary to access the full benefits is ambiguous and could lead to different fees among different debit cards, and would like the statement removed. Because carriers who choose to utilize debit cards as a form of payment still need to provide employees with his or her full benefit amount, no change to the regulations has been made.

Use of Accruals (Subpart 380-6)

Three comments opposed section 380-6.2(c) permitting employers to charge employees' leave accruals in accordance with the FMLA, when a period of paid family leave is concurrently designated as FMLA leave by the employer. The FMLA is a federal statute, employers covered by it are entitled to follow it when administering a period of FMLA leave which may be concurrent with a period of paid family leave taken under Article 9 of New York's WCL. Accordingly, no change to the regulations has been made.

The Board received a comment from a contractors association expressing concern about employees receiving more than the cap amount when taking leave from two employers. Because employees are entitled to take leave at the same time for the same qualifying event from multiple

covered employers and may receive their full benefit amount from each, no change to the regulation is needed.

The Board received a comment which was concerned that employees with two jobs may take leave from both in a way that exceeds the maximum benefit amount in section 204 of the WCL or takes leave sequentially from the two jobs in violation of section 380-6.1(b) of proposed regulations. An employee with two jobs may have deductions taken from two jobs that reach the maximum deduction for each employer, and receive equivalent benefits. To prevent an employee from taking more than maximum duration of paid family leave, section 380-7.5(b) permits carriers to “coordinate efforts to create an electronic portal in order to file and administer claims or paid family leave and in order to coordinate benefits.” Accordingly, no change to the regulations has been made.

Compliance and Coverage (Subpart 380-7)

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 two comments asking for section 380-7.2(b)(4) to clarify how employers can deduct employee contributions while an employee is collecting benefits under section 204. Section 209(3)(b) of the WCL mandates that no employer shall be required to fund any portion of paid family leave benefits. Section 380-7.2(b)(4) permits, but does not require, employers to collect employee contributions for periods in which an employee is on leave. A period where an employee is collecting disability benefits and is not yet eligible for paid family leave is explicitly excluded. The exception is to accommodate section 380-2.5(e), if an employee is not yet eligible for paid family leave and the period does not count toward eligibility, it would be inequitable to allow an employer to collect contributions from the employee during that time. Section 380-7.2(b)(3) and section 209(5) of the WCL still apply, an employer may not deduct more than an employee’s share of the premium. The Board has determined no changes to the regulations are required.

The Board received comments concerned about employers’ ability to comply with section 380-7.3’s requirements for maintaining or reinstating health insurance. Section 203-c of the WCL requires employers to maintain employees’ health insurance under the same terms while an employee is on paid family leave. The federal FMLA requires employers to maintain employee’s health insurance while on FMLA leave, and section 380-7.3 refers to the same requirements. Accordingly, no change to the regulations has been made.

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.

A comment asked for section 380-7.7(i) to be amended to clarify that any payments received by a carrier must be put toward a policy's disability and paid family leave coverages equally. Section 380-7.7(i) requires a carrier to apply any amount received to both the disability policy and paid family leave rider, no change to the regulations is required.

Reinstatement (380-8)

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 a comment suggesting the removal of "or if the employer's actions would have affected the employee if he or she was not on family leave" from section 380-8.2(e) or more clarifying language. However, because, as stated in the previous Assessment, "an exhaustive list [of retaliatory actions by employers] is not necessary or possible" and the Board believes the wording is sufficient, no change has been made.

The Board received a comment requesting clarification as to what the same or comparable position means, and whether it tracks the meaning of "same or equivalent" under FMLA. The Board will issue further guidance on this, but no change to the regulation has been made.

The Board received two comments opining that the removal of the 120 day period to file a formal request for reinstatement essentially means an unending statute of limitations or an exceedingly long one. However, section 120 of the WCL provides for a two year statute of limitations on discrimination complaints and this cannot be changed by regulation, so no change 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.

Arbitration (380-9)

The Board received a comment suggesting that section 380-9.10(c) measure the 10 days for payment from date filed. The Board agrees, and has made this change.

The Board received a comment taking issue with the arbitration section of the proposed regulations, opining that it favors an employer, specifically citing that arbitration fees are paid by the employer. However, because arbitration fees are paid by the carrier or self-insured employer, if applicable, not the employer generally, no change to the regulations has been made.

The Board also received a comment objecting to the proposed penalties on employers. However, the penalties are statutory and cannot be changed by regulation, so no change has been made.

General Comments

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 required insurers to state the basis for the denial of a paid family in section 380-5.4(a)(a).

The Board received a comment which asked for the employee contribution rate to be a percentage or a fixed amount, rather than a percentage up to a fixed amount. The Department of Financial Services sets the maximum employee contribution annually consistent with section 209 of the WCL. They set the contribution at .126% of an employee's weekly wage, up to a maximum contribution of .126% of the state average weekly wage. A comment also believed the employee contribution amount was too low. The Department of Financial Services set the rate based on actuarial calculations using available data. The Board and the proposed regulations do not determine the employee contribution rate. Accordingly no change to the regulations has been made.

Two comments asked for paid family leave to be an optional benefit for employees. The Board responded to similar questions in the assessment of public comment published on May 24, 2017, "this is a statutory requirement and cannot be changed by regulation, so no change has been made."

The Board received a comment requesting the regulations clarify how many hours count as a usual work day. Because the Board uses "days" and "weeks" for eligibility purposes, not hours, no change to the regulation has been made.

The Board received a comment requesting that the regulations clarify the interplay between the New York City Earned Sick Time Act and paid family leave. Section 205(c) of the WCL permits an employee to use accrued but unused vacation and personal leave to receive full salary during a period of paid family leave. Section 380-6.2(a) explicitly permits an employer to offer, and employee to elect, to use accruals or other paid time off to receive full salary during paid family leave. If the rules governing an employee's use of sick time allow them to use the accrued time off to care for a serious ill family member, and not for the employees own illness, it falls

within section 380-6.2(a) of the proposed regulations. Section 206(3) of the WCL prohibits an employee from collecting paid family leave while being paid disability benefits, workers' compensation, or sick pay for the employee's own illness. Leave for an employee's own illness does not qualify as paid family leave. Accordingly, no change to the regulations has been made.

The Board received a comment opining that the PFL system is untenable because there could be a disconnect between the carrier's determination and the employer's determination about whether or not leave should be denied. Because the employer does not decide whether to approve or deny a paid family leave claim, and if the employer suspects fraud it is free to contact the carrier, no change to the regulations has been made.

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.

Changes to the Regulations:

- Section 358-3.1(e) has been amended to remove an erroneous reference to part time employees.
- Section 355.9(8) has been amended to add the word "and" in the definition of fifty-two consecutive weeks.
- Section 380-2.5(a) has been amended to include a paragraph (3) that reads "in employment, as defined in this Title, of the covered employer for at least 26 consecutive weeks, such consecutive weeks may be tolled during periods of absence that are due to the nature of that employment, such as semester breaks, and when employment is not terminated during those periods of absence" to clarify that certain jobs, like professors, have built in breaks and that these do not restart the period of employment for purposes of eligibility for paid family leave.
- Section 380-2.5(c)(3) could reduce an employee's paid family leave pay if the week the employee goes on leave is counted. The section has been amended to include reference to the computation of average weekly wage under section 355.9(2), which permits the 8 week period to exclude a final partial week.
- Section 380-2.5(c) 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.
- Section 380-2.5(d) has been amended to clarify that the use of scheduled vacation time or other paid time off is counted as consecutive weeks or work weeks, and also days worked.

- Section 380-2.5(e) has been amended for the same reason – to clarify that periods of disability taken pursuant to Article 9 will not be counted as weeks of employment or days worked for determining eligibility for PFL.
- Section 380-2.5(g)(3) has been amended to add a missing “and” to the sentence.
- Section 380-2.6(a) has been amended to state that employers “shall” provide employees who qualify the option to sign a waiver instead of “may” to clarify that while whether or not to execute the waiver is the employee’s option, the employer is obligated to give an eligible employee that choice, as well as correcting a comma to a semicolon.
- Section 380-2.9 has been amended due to confusion about this section and the need for clarification. Section 380-2.9 now reads: “Covered employers with employees or a class or classes of employees subject to a collective bargaining agreement shall not be required to supply such employees with paid family leave coverage when the collective bargaining agreement (i) provides paid family leave benefits at least as favorable as set forth in subdivision (e) of section 358-3.1 of this Subchapter; and, (ii) does not permit an eligible employee to waive his or her rights to paid family leave or otherwise opt-out of Article 9 except as permitted in section 380-2.6 of this Subpart. With the exception of the requirements set forth in the preceding sentence, a collective bargaining agreement may provide rules related to paid family leave that differ from the requirements set forth in this Subchapter. Where the collective bargaining agreement does not provide a different rule, the provision of this Subchapter shall apply to family leave benefits.”
- The heading for section 380-3.1 has been amended to spell out paid family leave rather than using the PFL acronym.
- The heading of section 380-4.2 has been amended to remove “or to care for a covered service member (military caregiver leave)” to clarify that this military caregiver leave is the same as caring for a family member with a serious health condition.
- Section 380-5.1(c) has been amended to add a “d” to complete and to change “have” to “has.”
- Section 380-5.2 has been updated to remove the capitalization when referencing a request for paid family leave that is in a format other than what is prescribed by the Chair.
- Section 380-5.3 has been amended to allow carriers to provide confirmation of a receipt of a complete claim within three business days rather than one.
- Section 380-5.4 has been amended to add references to “self-insured employer” after “carrier” throughout to clarify that these provisions apply to both insurance carriers and self-insured employers when applicable. 380-5.4(a) has also been amended to correct the spelling of “occurrence.”
- Section 380-5.5 has been amended to capitalize Chair throughout.
- Section 380-5.6 has been amended to add quotation marks and fix capitalization to definitions and to delete the definition of “no cost” since it is not used in this section. Section 380-5.6(e)(4) has also been amended to reflect that ATM locations may change and now reads “If offering employees the option of receiving payment via debit card, a list of locations (current at the time the carrier or self-insured employer provides the list to the

employee) where employees can access and withdraw wages at no charge to the employees within reasonable proximity to their place of residence or place of work.”

- Section 380-7.2(b) has been amended to spell out “Workers’ Compensation Law section.”
- Section 380-7.2(c) has been amended to clarify when an employer can take deductions from employees and now reads “Unless otherwise specified in this Part of section 209 of the Workers’ Compensation Law, an employer’s failure to withhold may not be recovered by withholding larger than the maximum employee contribution at a later date.”
- Section 380-7.2(d) has been amended to clarify that “this” Article refers to Article 9.
- Section 380-7.7(g) has been amended to add the word “the” in front of “Chair’s designee.”
- Section 380-7.9 has been amended to clarify reference to “this Part or Article 9” rather than just “this Article.”
- Section 380-8.1(b) has been amended to include reference to section 120 of the WCL and that an employee “shall file with the employer and the Chair a formal request on the form prescribed by the Chair.”
- Section 380-8.2(a) has been amended to clarify that the formal request must be written.
- Section 380-8.2(c) has been updated to add two sentences that read “The employer shall file an answer to the employee’s complaint within 30 days receipt of notice from the Board. Failure of an employer to file an answer may result in waiver of defenses to the complaint.”
- Section 380-8.2(d) was amended to correct the spelling of “ineligible.”
- Section 380-9.8(a) has been amended to capitalize “The” and “When.”
- Section 380-9.10(b)(3) has been amended to remove an extra “and.”
- Section 380-9.10(c) has been amended to have awards be paid to the prevailing party no later than 10 days after filing of the decision.
- The title to Subpart 380-10 and the title to section 380-10.1 have been switched to clarify that Subpart 380-10 deals with Voluntary Coverage while 380-10.1 concerns Public Employers that Opt In.
- Section 380-10.1(c) has been deleted because it is duplicative of section 380-10.2(c).
- Section 361.1(f) has been amended for clarification, deleting an “and” and adding a “who.”
- Section 361.1(g) has been amended and now reads “no employer may collect any contributions above the maximum rate allowed . . .” just for clarification.
- Section 361.3-a has been renumbered and is now subdivision (f) of section 361.3
- Section 361.4 has been amended to fix the lettering and remove erroneous references to the WCL.