MEMORANDUM

TO: LeadingAge New York

FROM: Hinman Straub P.C.

RE: New York Paid Family Leave Law & Workers’ Compensation Board’s Final Rule

DATE: July 19, 2017

On April 4, 2016, Governor Andrew Cuomo signed the New York Paid Family Leave Benefits Law (“PFL”) which consists of a series of amendments and additions to the New York State Workers’ Compensation Law (“WCL”). The PFL provides eligible employees up to 12 weeks of paid family leave. The PFL will go into effect on January 1, 2018.

On February 22, 2017, the New York Workers’ Compensation Board (“WCB”) and the New York Department of Financial Services (“DFS”) filed proposed regulations implementing the PFL and received public comment on the regulations.

On May 24, 2017, the WCB revised its proposed regulations and published a Notice of Revised Rule Making in response to public comment. Thereafter the WCB received additional public comment.

On May 31, 2017, the DFS published its Final Rule regarding the rating of family leave benefits coverage. The Final Rule did not implement significant changes to the proposed regulations. On June 1, 2017, the DFS published a separate decision detailing the premium rate for family leave benefits and the maximum employee contribution used to finance the paid family leave benefits (the “Premium Rate Decision”). The DFS Regulations were summarized in a prior memorandum dated June 2, 2017, which is available upon request.

On July 19, 2017, the WCB published its Final Rule with respect to implementation of the PFL. The Final Rule did not implement significant changes to the WCB’s revised proposed
regulations. This memorandum provides an overview of the components of the WCB’s Final Rule.

Employee Eligibility for Paid Family Leave

The PFL and the Final Rule set forth three specific situations in which employees will be eligible for a paid leave of absence:

1. When paid leave is necessary to provide care, including physical or psychological care, to their family members due to a family member’s serious health condition;

2. To bond with their newborn children during the first year of the child’s life, or, in the case of adoption or foster care placement, for the first year after the placement of a child with the employee; and

3. For any qualifying reason as provided for under the federal Family and Medical Leave Act arising from the employees’ spouse, domestic partner, child, or parent being on active military duty, or, alternatively, being notified of an impending call or order to active military duty.

WCL § 201(15). Of note, the PFL does not allow the employee to take paid leave for their own medical condition or circumstance.

The Final Rule provides that both full-time and part-time employees are eligible for paid family leave benefits. Full-time employees (those who work more than 20 hours per week) are eligible for leave benefits after 26 consecutive weeks of work for the employer. 12 NYCRR § 380-2.5(a). In contrast, part-time workers (those who work less than 20 hours per week) are eligible for leave benefits once they have worked 175 days in such employment. 12 NYCRR § 380-2.5(b).

Paid Family Leave Benefit Levels

The Final Rule states that for any 52-week calendar period, the length of maximum available leave benefits and amount of weekly benefits to the employee will be as follows:

1 The WCB’s initial proposed regulations defined part-time employees as those who worked less than five days a week, rather than the hours worked per week. The WCB received several comments that the definitions of full-time and part-time employees should be amended to account for employees working compressed schedules whereby they work longer hours, but over the course of only a few days of the week. In the Final Rule, 12 NYCCRR § 380-2.5(a) and (b) were revised to specify that the 26 week eligibility criteria applies to employees who work more 20 or more hours per week, and the 175 day eligibility criteria to those who work less than 20 hours per week. In addition, 12 NYCCRR § 380-2.5(b) was revised to state that any employee can utilize weekly leave benefits as long as they are eligible for benefits according to the criteria of § 380-2.5(a). Further, the initial proposed regulations were revised to state that daily leave benefit payments are calculated based on the number of days worked per week for all employees—regardless of full or part-time status.
• January 1, 2018: 8 weeks paid at 50% of the employee’s average weekly wage or 50% of the state average weekly wage, whichever is less;

• January 1, 2019: 10 weeks paid at 55% of the employee’s average weekly wage or 55% of the state average weekly wage, whichever is less;

• January 1, 2020: 10 weeks paid at 60% of the employee’s average weekly wage or 60% of the state average weekly wage, whichever is less; and

• January 1, 2021: 12 weeks paid at 67% of the employee’s average weekly wage or 67% of the state average weekly wage, whichever is less.

12 NYCRR § 358-3.1(e). Employees may be paid family leave benefits in a manner similar to wages, such as by debit card, direct deposit, or check. 12 NYCRR § 380-5.6(a).²

As set forth above, the Final Rule indicates that paid family leave benefits will increase annually until January 1, 2021. However, the State Superintendent of Financial Services will have discretion to delay the increases in the benefit level if such increases will have a negative impact on the state’s economy. WCL § 204(2)(a).

The Average Weekly Wage (“AWW”) referenced in the schedule set forth above is determined annually following a comprehensive analysis by the New York State Department of Labor (“DOL”). The DOL’s Research and Statistics Division computed the AWW for calendar year 2016 to be $1,305.92 per week. The determination is made based on the prior calendar year wages reported by the Commissioner of Labor to the Superintendent of Financial Services on March 31 of each year.

In addition to the baseline benefits set forth above, an employer may offer an employee to charge all or part of their accrued but unused vacation time or personal leave time and receive their full salary during the leave period. WCL § 205(c).

Further, the Final Rule states that when employees of a covered employer are entitled to receive paid family leave benefits under a collective bargaining agreement, the employer will be relieved from providing additional benefits under the PFL as long as certain conditions are satisfied. The paid family leave benefits received through the collective bargaining agreement must be “at least as favorable” as the benefits set forth above and the collective bargaining

² The WCB’s initial proposed regulations stated that benefit payments disbursed via debit card had to allow for local access to ATMs at no cost to the employee. The initial regulations also stated that the carrier was limited to offering payment by direct deposit or debit card. In response to comment, the WCB revised this provision to eliminate the requirement that carriers provide payment by debit card or direct deposit and eliminated the local access to ATMs requirement.
agreement may not extend the length of the employment period in order to be eligible for benefits. 12 NYCRR §§ 380-2.9.

Requesting Paid Family Leave

The Final Rule requires an employee seeking paid family leave benefits to complete the Request for Paid Family Leave (Form PFL-1), which is prescribed by the Chair of the Workers’ Compensation Board, and submit to the employer’s insurance carrier or to the self-insured employer. 12 NYCRR § 380-5.1. While the Board has promulgated the form that meets the requirements of the statute and the regulations, the insurance carrier or self-insured employer may accept the filing of this request in another format, such as by phone or electronic portal. 12 NYCRR § 380-5.1.

In order to complete the request for paid family leave, the employee must also supply copies of supporting documentation (e.g., a birth certificate or medical certification) that provides the details surrounding the family leave requested. 12 NYCRR § 380-4.2; 12 NYCRR § 380-5.1(b).³

Where the qualifying event that necessitates the paid leave is foreseeable, an employee must provide the employer with at least 30 days advance notice before leave is to begin. 12 NYCRR § 380-3.1(a). Pursuant to the Final Rule, foreseeable qualifying events include: an expected birth, placement for adoption or foster care; planned medical treatment for a serious health condition of a family member; the planned medical treatment for a serious injury or illness of a covered service member; or other known military exigency. 12 NYCRR § 380-3.1(a).⁴

Where an employee is unable to provide 30 days advance notice due to, for example, a medical emergency, the employee must provide notice to the employer as soon as practicable. 12 NYCRR § 380-3.1(a).

Acceptance or Denial of Paid Family Leave Claims

Once the carrier receives the completed request for paid family leave, the carrier must pay the claim or deny the claim within 18 days. 12 NYCRR § 380-5.4(a). The carrier must specifically state the reason for the denial and include any other relevant information considered

³ The WCB’s initial proposed regulations required that certifications from medical providers of a family member’s serious health condition include the ICD-10 code for the diagnosed condition. The WCB received comments from insurance carriers and various advocacy groups that this could result in possible delays over incomplete forms as well as health privacy concerns. As a result, in the Final Rule the WCB removed the ICD-10 code requirement in 12 NYCRR 380-4.2(a)(3).

⁴ The initial regulations stated that where an employee submitted a pre-filed application more than 30 days in advance of a need for foreseeable leave, the carrier was responsible for retaining copies of their incomplete applications and sending applicants a list of missing information. In response to comment that pointed out this would be extremely burdensome for the carriers, the WCB no longer requires the carrier to send the employee the request for paid family leave in addition to the list of missing information. In addition, the WCB’s initial regulations stated that where the employee submitted a pre-filing request for paid family leave and the package was incomplete, carriers were required to provide instructions regarding how to submit the missing pieces of information and a particular individual contact person to whom the employee should submit said documents. The Final Rule modifies this requirement and allowed carriers to provide contact information for the applicable office rather than an individual contact person. 12 NYCRR § 380-5.3(b)(3).
by the carrier in making its decision. 12 NYCRR § 380-5.4(a)(1). The carrier may deny coverage only under certain circumstances. 12 NYCRR § 380-5.4(d). For example, coverage may be denied because the employee is not an employee of the employer, or the requested amount of leave is in excess of what is permitted under the law, or the claim was not timely made. 12 NYCRR § 380-5.4(d). In order for a carrier to deny a claim based on cancellation of paid family leave coverage, the cancellation must have been made effective by the carrier notifying the WCB of such cancellation. 12 NYCCRR § 380-7.7(d).

Pursuant to 12 NYCRR § 380-5.4(h), the carrier or self-insured employer is required to make all reasonable efforts, consistent with the principles of N.Y. Executive Order 26, to communicate with the employee regarding their paid family leave claim in the language identified by the employee on the Request for Paid Family Leave form. Executive Order 26 dictates that state agencies shall translate vital documents and notices into the most common non-English languages in New York. Accordingly, the WCB has indicated that it will translate the request for paid family leave forms and instructions into seven languages.

In addition, under the DFS proposed regulations, insurance carriers are required to submit certain identifying information to the State Superintendent of Financial Services regarding any employers covered under a policy with family leave benefits. In particular, they must identify employers using the employer’s SIC Industry code. The WCB has indicated it will conform to the proposed regulations of the DFS and only require an employer’s SIC code, rather than the NAICS code.

**Intermittent Paid Family Leave**

Employees may also use paid family leave on an intermittent basis for less than a full workweek in increments of one full day or one fifth of the weekly benefit. WCL § 204(a). With respect to intermittent leave, the employer can require that the employee provide notice as soon as is practicable before each day of intermittent leave. 12 NYCRR § 380-3.1(c).

**Health Insurance During Paid Family Leave**

The Final Rule states that employers must continue health insurance coverage to employees during paid family leave and employees remain responsible for continuing to make any normal contributions to the cost of health insurance premiums while on leave. 12 NYCRR § 380-7.3(a). In the event that an employer changes the health insurance plan while the employee is on paid leave, the employee remains entitled to health insurance coverage and the employee must continue to pay the new premium rates. 12 NYCRR § 380-7.3(b)-(c).

Employers may terminate health insurance coverage for employees on leave who are more than 30 days late in paying their share of the premium. 12 NYCRR § 380-7.3(d)(1). In

---

5 The WCB’s initial proposed regulations did not explicitly require carriers to state the basis for their denial of a request for paid family leave. The Final Rule adds language to require carriers to state the basis for the denial.

6 The WCB’s initial proposed regulations required that carriers to provide proof of cancellation to the WCB before each denial on this basis. In the Final Rule, the section was revised to indicate that attaching proof of cancellation to each denial is not required.
order to cancel coverage of the employee on leave, the employer must mail a notice to those employees at least 15 days before their health insurance coverage is to be terminated. 12 NYCRR § 380-7.3(d)(1). Where an employee’s health insurance coverage lapses due to non-payment or the employee chooses not to retain health insurance during the leave, the employee’s health insurance coverage must be reinstated upon return to work. 12 NYCRR § 380-7.3(e).

**Financing Paid Family Leave**

Paid family leave benefits will be financed by deductions from employee pay. WCL § 209(3)(b). **No employer is required to fund any portion of the family leave benefit.** WCL § 209(3)(b). Employers may continue to deduct employee contributions when an employee is receiving family leave benefits. 12 NYCRR § 380-7.2(b)(4).

On June 1, 2017, the DFS published the maximum employee contribution used to finance the paid family leave benefits (the “*Premium Rate Decision*”). The maximum employee contribution consists of 0.126% of an employee’s weekly wage up to and not to exceed the statewide Average Weekly Wage (“AWW”), which in 2016 was $1,305.92. Thus, the maximum weekly employee contribution to paid family leave benefits is $1.65 ($1,305.92 x .00126 = $1.65). On July 1, 2017, employers may begin collecting the weekly employee contribution for paid family leave for coverage beginning on January 1, 2018. 12 NYCRR § 380-2.4.

An employee may be provided a waiver to make payroll contributions to family leave where they are ineligible to receive the benefits. 12 NYCRR § 380-2.6. As discussed above, this arises where the employee’s schedule is 20 more hours per week, but the employee will not work for the required 26 consecutive weeks or the employee’s schedule is less than 20 hours per week and the employee will not work 175 days in a 52 consecutive week period. 12 NYCRR § 380-2.6. The WCB has yet to develop the waiver form.

In the event that the employee’s schedule is later changed so that the employee is required to work for 26 weeks or 175 days in a year, the waiver will be deemed revoked within eight (8) weeks of the change in schedule. 12 NYCRR § 380-2.6(b). After the employer notifies the employee that his or her waiver has been revoked, the employer should begin immediately taking contributions from the employee and shall make contributions for paid family leave

---

7 The WCB’s initial proposed regulations did not explicitly state that employers could continue to collect contributions while the employee is on paid family leave. In response to public comment, 12 NYCRR § 380-7.2(b)(4) was revised to provide clarification on the topic.

8 Following the release of the WCB’s initial proposed regulations, the WCB received several comments requesting the removal of 12 NYCRR § 380-2.4(d) to allow employers to begin collecting employee contributions to fund paid family leave on July 1, 2017, while WCL § 209(1) states that employees shall contribute to the cost of providing family leave benefits beginning January 1, 2018. However, the WCB believes that the WCL § 209 envisions permitting employers to collect employee contributions after the Superintendent of Financial Services has set the rates on June 1, 2017 because WCL § 209(5) requires that employees should pay the total costs of the family leave premiums. The WCB believes that 12 NYCRR § 308-2.4 accurately reflects the legislative intent of the statute and did not revise the regulation.

9 The WCB’s initial proposed regulations lacked clarity with respect to when the employer is permitted to provide the option to file a waiver. The WCB revised this section to explicitly permit employees that will be employed for fewer than 26 consecutive weeks or 175 days in a 52 week period to waive coverage.
coverage, including any retroactive amounts due from the employee’s date of hire. 12 NYCRR § 380-2.6(b).

**Employee Handbooks and Posting**

Under the Final Rule, employers are required to update their employee handbooks to include written guidance on paid family medical leave. 12 NYCRR § 380-7.2(a)(1). The written guidance must include all of the employee’s rights and obligations under the Final Rule, including information on how to file a claim for paid family leave. 380-7.2(a)(2). If an employer does not maintain an employee handbook, it is still required to provide written guidance to employees on the paid family leave benefits. 12 NYCRR § 380-7.2(a)(2).

Employers must also post a notice concerning paid family leave in plain view where employees and applicants can readily see the notice. 12 NYCRR § 380-7.2(e). The posted notice must be in a form prescribed by the Chair of the Workers’ Compensation Board, who has not yet issued a form notice. 12 NYCRR § 380-7.2(e).

**Reinstatement Following Paid Family Leave**

Upon return from a paid family leave, employees must be restored to the same employment position they occupied when the leave commenced, or to be restored to a comparable position with comparable employment benefits, pay and other terms and conditions of employment. WCL § 203-b; 12 NYCRR § 380-8.1. Employers are prohibited from eliminating any employment benefit that had accrued prior to the date on which the leave commenced. WCL § 203-b. In the event that the employee is not reinstated, the employee can file with the employer and the Chair of the WCB a formal request that the employer come into compliance with WCL 203-b. 12 NYCRR § 380-8.1(b).10 Thereafter, if the employer fails to respond within 30 days, the employee can file a complaint pursuant to WCL § 120 for discrimination and/or retaliation. 12 NYCRR § 380-8.2.

**Dispute Resolution**

The Final Rule provides for alternative dispute resolution procedures for claims arising under the PFL. The Final Rule requires that any claim-related dispute under the PFL, including eligibility, benefit rate, and duration of paid leave must be resolved through arbitration. 12 NYCRR § 380-9.1. The Chair of the Workers’ Compensation Board is charged with appointing and disqualifying arbitrators to resolve these disputes. 12 NYCRR § 380-9.2.

Arbitrators must attempt to first resolve all disputes by desk arbitration, which means the arbitrator will render a decision on the matter based only on the parties’ written submissions and not conduct any hearings. 12 NYCRR § 380-9.8. If the arbitrator determines that further development of the record is necessary, the arbitrator may hold a hearing to gather oral

---

10 The WCB’s initial proposed regulations required that the employee file the formal request for reinstatement with 120 days of the alleged violation as a pre-condition to filing a complaint. The Final Rule eliminates the 120-day requirement, but retains the requirement that the employee file a form request for reinstatement prior to submitting a complaint.
testimony.  12 NYCRR § 380-9.8(a). All arbitration fees are the responsibility of the employer and a failure to pay said arbitration fees will result in waiver of all defenses. 12 NYCRR § 380-9.5.\(^\text{11}\)

**Penalties**

If an employer fails to comply with the Final Rule regarding paid family leave benefits, they are subject to a maximum penalty equal to .5% of the employer’s weekly payroll for the period of the failure. 12 NYCRR § 380-7.2(d). Employers are also subject to an additional fine no larger than $500.00. 12 NYCRR § 380-7.2(d).

In the event that an employee makes a claim for paid family leave upon an uninsured employer, the Special Fund for Disability Benefits shall make payment of the benefits to the employee. 12 NYCRR § 380-5.5(a). Thereafter, the Special Fund for Disability Benefits will attempt to seek reimbursement from the uninsured employer of any benefit payments made on behalf of the uninsured employer. 12 NYCRR § 380-5.5(b). The employer is prohibited from seeking contributions from its employees to pay the required reimbursement resulting from a lack of coverage. 12 NYCRR § 380-5.5(b).

**Coordination with Other Leaves**

Employees may not stagger FMLA and New York paid family leave time to take more than 12 weeks of family medical leave, or receive paid leave in excess of the maximum duration of leave permitted at the time by the phase-in schedule. WCL § 205(2)(a); 12 NYCRR § 380-2.5(f).

In certain situations where an employee eligible for both New York State disability benefits under the Workers’ Compensation Law and paid family leave during the same period of 52 consecutive calendar week, the employer is entitled to a maximum of 26 total weeks of disability and family leave benefits during that period of time. 12 NYCRR § 380-2.5(f). The employee may not concurrently receive paid family leave benefits at the same time that the employee is receiving total disability payments pursuant to a claim for Workers’ Compensation. WCL § 206(3)(a).

Further, employees are not permitted to receive paid family leave benefits where they are on administrative leave from his or her employment or collecting sick pay or paid time off from the employer. WCL §§ 206.3(b)-(c).

\(^\text{11}\) The WCB’s initial proposed regulations included language that the arbitrator and dispute resolution forum could become parties to a court proceeding in relation to the arbitration award. However, the WCB determined that this language violated the common law principle of arbitral immunity, which refers to the immunity that is extended to an arbitrator for acts arising out of the scope of their arbitral functions. As a result, in the Final Rule this language was removed.
Contrasts with the FMLA

The PFL and the Final Rule differ from the FMLA on several key aspects. The FMLA provides eligible employees with 12 weeks of unpaid family leave and applies to employers with 50 or more employees. In contrast, the Final Rule allows for paid family leave and apply to all New York employers.

The FMLA also provides unpaid leave for an employee’s serious health condition whereas the PFL and the Final Rule does not provide for benefits for the employee’s serious health condition.

In addition, as stated above, under the PFL and the Final Rule, full-time employees become eligible after 26 consecutive weeks of work, and part-time workers become eligible on their 175th day of work. The FMLA requires that employees must be employed for 12 months and worked 1,250 hours in the previous 12 months. Thus, employees may be eligible for New York paid family leave benefits even if they are not eligible for leave under the FMLA.

Conclusion

As set forth above, the PFL does not go into effect until January 1, 2018. Thus, while the PFL and the Final Rule represents a significant shift in the legal landscape concerning paid family leave in New York, employers and insurance carriers have the remainder of 2017 to review and revise their existing policies and procedures in order to comply with the PFL and the Final Rule. Employers should utilize this period of time to communicate with their workers’ compensation carriers regarding adding PFL benefits to their coverage and to prepare their payroll systems to account for a family leave benefits deduction to employee pay.

Hinman Straub is available to provide a more in-depth analysis of the PFL and the Final Rule and their potential impact on your existing policies and procedures. If you have any additional questions, please contact Joseph M. Dougherty at (518) 436-0751 or jdougherty@hinmanstraub.com.