SEYFARTH SHAW

Management Alert

Revised Regulations Issued for New York Paid Family Leave Law

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***Seyfarth Synopsis**: On May 25, 2017, the Workers' Compensation Board, incorporating comments from Seyfarth Shaw LLP and other industry groups, proposed another set of revised regulations for New York's Paid Family Leave Law. The Notice and Comment period extends until June 23, 2017. Paid Family Leave's effective date of January 1, 2018 remains unchanged.*

New York's Paid Family Leave Law ("PFL") will be fully phased in by 2021, at which time it will provide eligible employees with up to 12 weeks of job protected paid leave in a 52-consecutive week period. When fully implemented, PFL will entitle eligible employees to receive up to 67% of their average weekly wage or the state average weekly wage, whichever is less. Further details about the law remain available in our prior alerts distributed on March 10, 2017 and April 19, 2016. The key changes included in the revised regulations are as follows.

Paid Family Leave Definitions

In response to comments by industry groups, the revised regulations expand the definition of "wages" to require that tips or gratuities be included as wages if the employee is engaged in employment in which tips and gratuities customarily constitute part of his or her pay. The previous version's definition of wages was limited to the reasonable value of board, rent, housing, or similar advantage received under the contract of hiring in addition to the stipulated money rate.

Employees can still look forward to an expansive definition of "family member," as the Board expressly rejected comments requesting the definition be narrowed to track the FMLA, under which a qualifying family member is a spouse (as defined under state law), child, or parent. Under PFL "family member" includes a child, parent, grandparent, grandchild, spouse, or domestic partner.

Employee Eligibility

The revised regulations further eliminate the labels "Full-Time" and "Part-Time" for employees. The regulations provide instead that an employee of a covered employer whose regular employment schedule is 20 or more hours per week will become eligible to take family leave during his or her employment provided that the employee has been employed for at least 26 consecutive work weeks.

In contrast, an employee of a covered employer whose regular employment schedule is fewer than 20 hours per week will become eligible to take family leave after 175 days of employment. An employee who does not reach these thresholds may waive family leave benefits, as discussed below.

Family Leave Waiver

In line with the elimination of "Full-Time" and "Part-Time" definitions, the revised regulations now specify that an employee of a covered employer may be provided the option to file a waiver of family leave benefits (i) when his or her regular employment schedule is 20 hours or more per week but the employee will not work 26 consecutive weeks, or (ii) when his or her regular employment schedule is less than 20 hours per week and the employee will not work 175 days in a 52 consecutive week period. The other provisions relating to the original waiver provisions are unchanged.

Collective Bargaining Agreements ("CBA")

The revised regulations continue to provide that an employer who provides paid family leave benefits under a CBA is relieved from providing PFL if the CBA provides benefits that are at least as favorable as the benefits under PFL.

The revised regulations clarify that a CBA may provide rules related to PFL that differ from the requirements in the law. The revised regulations permit employees to collectively establish their eligibility for PFL benefits through actual time worked at any employer covered by the CBA, so long as the time period does not extend beyond 26 consecutive work weeks or 175 day thresholds discussed above.

Further, a CBA may provide that the union, acting as the employer, may be responsible for all time records and payroll deductions related to the administration of PFL. Where a CBA does not provide a different rule, the PFL regulations will govern its use.

Use of Leave

The revised regulations change the requirement that when an employee takes intermittent family leave, the employee need only provide notice of the need for leave at the *start* of PFL. Now, the regulations specify that an employer may require the employee to provide notice as soon as practicable before *each day* of intermittent leave. The regulations still do not provide for leave to be taken in increments smaller than a day.

In response to a question submitted by Seyfarth Shaw during the initial comment period, a representative from the Board noted that if an employee takes leave pursuant to company policy prior to the effective date of the law, this leave will not count against the employee's maximum benefit, and the employee may take an additional 8 weeks of leave in 2018 for any qualifying reason. For example, an employee may take the maximum amount of bonding leave offered by his or her employer in 2017, and then, so long as it is within twelve months of the birth or placement of a child, take an additional eight weeks of bonding leave in 2018. While this is a one-time exception for 2018 due to the law's effective date, employers should keep this in mind in the coming months.

Use of Accruals for Family Leave Benefits

Critically, the revised regulations now specify that an employer covered by the federal Family Medical Leave Act ("FMLA") that designates a concurrent period of family leave for PFL and FMLA may charge an employee's accrued paid time off in accordance with the provisions of the FMLA. From a practical standpoint, this means that most employers with FMLA policies providing for exhaustion of paid leave before taking FMLA on an unpaid basis will not have to revise their FMLA policies.

However, two important caveats follow. First, only those employers that are covered by the FMLA (*i.e.*, with fifty or more employees in twenty or more workweeks in the current or preceding calendar year, and certain public employers) are permitted to follow FMLA rules on use of accrued but unused time off. Second, these rules will only apply when an employee taking PFL leave is taking it for an FMLA-qualifying reason and the leaves are running concurrently.

The revised regulations remain silent on the interplay between PFL and the New York City Earned Sick Time Act ("ESTA"), which provides up to 40 hours of sick leave, at full pay, to certain New York City employees. Despite our questions as to whether ESTA time may run concurrently with PFL, the Board has not addressed this potential issue in the revised regulations.

Absent further clarification from the Board, employers covered by ESTA should assume that eligible employees are entitled to any applicable ESTA time as well as PFL, and that such time *may not* run concurrently.

Reinstatement Following Leave

The revised regulations still do not address reinstatement obligations for "key employees." Under the FMLA "key employees" may be denied reinstatement based upon a finding that "substantial and grievous economic injury" will result if the employee is reinstated.

Procedure for Complaints Regarding Reinstatement

The earlier version of the regulations required an employee who was not reinstated to their position following a period of PFL to file a formal request for reinstatement with the Board within 120 days of the failure to reinstate. This formal request operated as a condition precedent to bringing a discrimination claim under the Workers' Compensation Law, and an employer's response to the formal request (or expiration of the time period in which to respond) triggered an aggrieved employee's 2 year statute of limitations period to file a discrimination claim with the Board.

The Board received several comments challenging this formal request requirement. In response, the Board eliminated the 120-day requirement for filing a formal request. The Board did not, however, change the requirement that a formal request must be made prior to filing a discrimination complaint at the Board. Similarly, the revised regulations still provide that an employer's response to the formal request (or expiration of the time period in which to respond) triggers an aggrieved employee's 2 year statute of limitations period to file a discrimination claim with the Board. This apparent oversight will certainly be the subject of further comments to the Board.

Weekly Contribution Amounts

On May 31, 2017, the New York State Department of Financial Services ("DFS") adopted final regulations which detail the method by which the employee contribution will be calculated. The amount of the contribution is calculated using a "community rate," which does not consider as a factor the utilization or expected utilization of PFL benefits. Nonetheless, the Superintendent of Financial Services has discretion as to which methodology to use to set the rate, and may prescribe either a defined dollar amount per employee or a percentage of the employee's average weekly wage.

DFS' final regulations continue to provide that the amount of the employee contribution is expected to be set by June 1, 2017, but has not set the amount as of this morning. Look out for an update detailing the amount once it is set.

Conclusion

Employers should be aware that, as of this writing, the permissible amount of the employee contribution is still expected to be set by June 1, and employers have the option of beginning deductions on July 1. Additionally, we have been advised that the Board is continuing to consider the appropriate tax treatment of PFL benefits. As with the last round of regulations, Seyfarth Shaw intends to submit comments on the revised regulations. We will report on PFL taxation policy and the amount of the employee contribution once set, and continue to track the progress of the regulations following the conclusion of comment period.

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