SEYFARTH SHAW

Management Alert

New York Workers' Compensation Board Releases Final Regulations for Paid Family Leave Law

By Gena Usenheimer and Meredith-Anne Berger

Seyfarth Synopsis: *The final regulations were released for the New York Paid Family Leave law, which will be effective January 1, 2018. The regulations contain few substantive changes from the revised proposed regulations, and many uncertainties remain.*

New York's Workers Compensation Board (the "Board") has just released the much-anticipated final regulations for the Paid Family Leave ("PFL") law, with few substantive changes from the last round of revised regulations. The Board's written response to the public comments indicates, however, that further guidance may be forthcoming as to the meaning and application of the final regulations. For more detailed information about the law and regulations, see our prior alerts on the law's passage, the proposed regulations, revised regulations, and employee contribution amount.

Key changes set out in the final regulations follow.

Eligibility

Employees who work 20 or more hours per week become eligible for PFL after 26 consecutive work weeks. Employees who work fewer than 20 hours per week become eligible for PFL after 175 days of employment.

The final regulations clarify that the use of scheduled vacation time or other paid time off approved by the employer should be counted towards both the 26 consecutive work week and 175 days-worked thresholds for PFL eligibility. In the same vein, the regulations clarify that periods of statutory short term disability will not be counted as weeks of employment or days worked for determining eligibility for PFL.

Under the final regulations, employers are *required* to provide employees with the option to waive PFL benefits where the employee's schedule does not allow the employee to reach the thresholds for PFL eligibility listed above. Employees are not, however, required to sign the waiver. The Board did not alter the provision that if an employee's schedules changes, such that he or she will become eligible for PFL, the previously signed waiver becomes invalid within eight weeks of the change and the employer can recoup the employee contribution amount back to the date of hire, after notifying the employee of its intent to do so.

The final regulations clarify that where periods of absence from employment are due to the nature of the employment, such as semester breaks, and when employment is not terminated during these periods, the breaks do not restart the period of employment for purposes of eligibility for paid family leave.

©2017 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.

While no change was made with regard to eligibility based on the location of employees, the Board clarified that employees who work in New York State, with only incidental work outside the state, are eligible for PFL, whereas employees who work in another state, who only incidentally work in New York, are not covered. The Board offered the following guidance, as well: if an employee does not perform his or her work in any one particular state, he or she is eligible 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. The Board indicated it will add additional examples as they arise to the published answers to frequently asked questions on the program's webpage.

Complaint Procedure

The final regulations require that before an employee may file a complaint of discrimination with the Board under Workers' Compensation Law Section 120, he or she must first file a written request for his or her employer to come into compliance with PFL. The written request is a condition precedent to bringing a discrimination claim, and an employer's response to the request (or expiration of 30 day time period in which to respond) triggers an aggrieved employee's two year statute of limitations period to file a discrimination claim with the Board.

There is no time limit, however, in which to file this written request. The time in which to file does not appear cabined by the two year statute of limitations period. In conjunction, we read these requirements as creating a virtually unending statute of limitations period for PFL claims to be brought before the Board. Although Seyfarth submitted a comment to the Board on this issue, the Board did not provide a substantive response.

Interplay With FMLA and NYC ESTA

The final regulations did little to further clarify the interplay between PFL and Family Medical Leave Act ("FMLA"). For example, PFL requires that an employee be returned to the "same or comparable" position following leave. FMLA requires that an employee be returned to the "same or equivalent" position following leave. Especially during periods when FMLA and PFL run concurrently, this differing standard is likely to cause confusion. Seyfarth Shaw requested guidance on whether "same or comparable" has the same meaning as the FMLA's "same or equivalent" language. The Board stated that it will issue further guidance on this, but did not revise the regulation.

The final regulations also did not clarify how New York City employers should treat leave under the NYC Earned Sick Time Act ("ESTA") when leave under ESTA is taken for a PFL qualifying reason. In particular, ESTA requires in most cases that time off be provided at full pay. In contrast, PFL requires employees to be given the choice of using accrued leave *or* to receive PFL benefits from the carrier. The regulations remain unclear on this point.

What's Next for Employers

Employers must implement a PFL policy and obtain coverage for PFL benefits before the effective date of January 1, 2018. Now that final regulations have been issued, employers should begin drafting policies and considering PFL's interplay with other leave policies, especially FMLA. As of July 1, 2017, employers are free, but are not required, to deduct employee contributions towards the cost of a PFL premium. Be on the lookout for additional Seyfarth alerts on this topic and an upcoming webinar covering the final regulations.

If you would like further information, please contact Gena Usenheimer at gusenheimer@seyfarth.com, or Meredith-Anne Berger at mberger@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

©2017 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.