ERIC The ERISA Industry Committee

Driven By and For Large Employers

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New York State Workers' Compensation Board
328 State Street
Schenectady, NY 12305

RE: State of New York Rule Making Activities—Workers' Compensation Board Paid Family Leave

Ladies and Gentlemen:

The ERISA Industry Committee (ERIC) is pleased to submit comments on the State of New York Workers' Compensation Board's proposed rules on New York's Paid Family Leave program ("Proposed Rules").

I. ERIC'S INTEREST IN THE ANNOUNCEMENT

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's members provide comprehensive paid leave programs that benefit tens of millions of workers and their families. ERIC has a strong interest in proposals, such as these proposed rules, that would affect its members' ability to provide quality and uniform paid leave benefits.

ERIC is grateful for the opportunity to provide comments on the Proposed Rules. We share the same goal of ensuring workers have access to paid family leave programs; however, we strongly encourage the State of New York not to adopt any final rules that increase the administrative and compliance burdens on large employers already providing paid leave benefits to their employees, or hinder large employers' ability to design their own leave benefits that meet the needs of their business and workforce while satisfying the intent of the New York law. Many large companies tailor their paid family leave plans to meet the overall compensation and employee benefits goals of the company, and are tailored to their industry, competitive environment, and the needs of their workers. As a result, ERIC member companies do not utilize a one-size-fits-all model for paid family leave programs.

ERIC appreciates the opportunity to provide comments on ways in which the administrative impact of the Proposed Rules can be decreased for large employers who already offer paid family leave programs. In particular, ERIC appreciates the opportunity to comment on: (i) the coverage of part-time employees, (ii) the definition of family member in the Proposed Rule; (iii) the requirement that the employee be in "close and continuous" proximity to the care recipient; and (iv) the release date of the community rates.

II. SUMMARY OF COMMENTS

The following is a summary of ERIC's comments, which are set forth in greater detail below:

1. Employers offering paid family leave should have the flexibility to decide whether their policies cover workers other than full-time employees. The definition of part-time employee under the Proposed Rules is not workable, and does not take into account factors that would allow an employee who works less than five days a week to be considered full-time.

2. The definition of care recipient, or the family member whom employees may use leave to care for, requires employers to do more than what federal law mandates. Federal law only requires that employers provide leave for employees to care for a child, spouse, or parent. The Proposed Rules reach further than this, creating both a patchwork effect and compliance nightmare for employers.

3. The requirement that employees be in close and continuing proximity to the care recipient should be clarified to inform employees that it must be "physical proximity." Several federal circuit court cases have found that proximity should be physical and not via electronic means. We believe the addition of the word "physical" would strengthen the findings in the federal circuit court cases.

4. The Superintendent of the Department of Financial Services should be encouraged to release community rates for premiums earlier than the June 1, 2017 deadline in order to provide employers with ample time to complete necessary actions associated with implementing the paid family leave program.

III. DISCUSSION

A. ***Part-Time Employee Coverage*****.** The Proposed Rules cover part-time employees, and mandate that employers provide them with paid family leave benefits. The Proposed Rules do not, however, provide a sufficient definition of who qualifies or is characterized as a part-time employee.

The Proposed Rules state that a part-time employee is an employee "on a work schedule less than [5] days per week." Looking to the actual statute that provides for paid family leave benefits, no greater insight is offered. Section 201 of the Workers' Compensation Law (WCL) defines an employee as "a person engaged in the service of an employer in any . . . trade, business or occupation carried on by an employer."[1] The Section continues to list what shall not be deemed employment but makes no reference to part-time employees to the degree of providing a hardline definition. Likewise, in Section 203 of the WCL, in providing for which employees will be eligible for family leave benefits, the section merely states that "[a]n employee regularly in the employment of a single employer on a work schedule of less than the employer's normal work

[1] N.Y. WORKERS' COMP. LAW §§ 201(5)–(6)(A) (Consol. 2016).

week shall become eligible for [paid family leave] benefits . . . on the [175] day of such regular employment."[2]

While the Proposed Rules and Sections 201 and 203 of the WCL in conjunction with one another provide an idea of who qualifies as a part-time employee, the resulting definition is derived from these statutes and regulations is unworkable. It does not account for other facts that must be considered when determining whether an employee is full or part-time.

For instance, there are employees who operate on a compressed work week or schedule. A compressed work schedule is one where an employee works the traditional full-time number of hours in less than the traditional number of workdays (i.e. working four 10-hour days rather than five 8-hour days). Under the current definition of a part-time employee, the Proposed Rules would disqualify such employees from receiving the full extent of leave available. Similarly, but on the opposite end, an employee could work more than five days a week but in total work less than the traditional full-time number of hours. This would lead to certain employees being entitled to leave benefits for doing less work than their full-time counterparts. Not only would this create disparate treatment of employees across the state, but would institute a level of unfairness.

Another example of where the definition of part-time employee under the Proposed Rules goes awry is if an employer's normal work week is less than five days a week. If an employee worked full-time for an employer that had a normal work week of four days, then he or she would reasonably be considered full-time under Section 203 of the WCL.[3] But, under the Proposed Rules he or she would be considered a part-time employee. Herein lies the disconnect between the enacted laws and the Proposed Rules that needs to be remedied.

ERIC respectfully requests that the definition of part-time employee be revised to provide greater clarity and note differences in workplace structures, industry practices, and better align the Proposed Rules and WCL. It should be more prescriptive in how it defines a part-time employee and not simply base it on the number of days worked per week. This can be done by spelling out both the length and hours of service that is required for an employee to be eligible for family leave benefits. For example, California's paid family leave law covers employees that have worked for an employer for at least 12 months, and have 1250 hours of service during the 12 months prior to leave. Including this level of specificity will ensure greater uniformity in application of the law, benefiting both the employees and employers. Specificity could, and should, be attributed to full-time employees as well in order to eliminate any grey-areas and future push back.

B. ***Definition of Family Member.*** The Proposed Rules states that employees will be afforded family leave benefits to care for family members. The Proposed Rules themselves offer no definition of who is a qualifying family member that an employee can care for.

[2] *Id.* § 203.

[3] This is supported by the following language: "[E]mployees in employment during the work period usual to and available during such [26] or more consecutive weeks in any trade or business . . . shall be eligible for family leave benefits." *Id.* § 203.

The WCL does, however, define family member as a child, parent, grandparent, grandchild, spouse, or domestic partner.[4] This definition—while already enacted—provides for more than what is required under federal law, the Family and Medical Leave Act of 1993 (FMLA). The FMLA entitles employees to take unpaid, job-protected leave for specified family and medical reasons. Under the FMLA, leave can only be taken to care for a child, spouse, or parent. The term spouse means "a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage."[5] A parent means "a biological, adoptive, step or foster father or mother, or any other individual who stood in *loco parentis* to the employee when the employee was a child."[6] Under these definitions, a domestic partner would fall within the meaning of a spouse, but a parent-in-law does not qualify as a care recipient under the FMLA. Neither does a grandchild or grandparent (unless he or she stood in *loco parentis* to the employee).

The expansion of who employees can take leave to care for under the Proposed Rules creates a compliance burden for large employers and infringes on their ability to provide consistent and uniform paid leave. Forcing employers to do more than what is federally mandated creates a patchwork of laws, which is a compliance nightmare for ERIC members that operate in multiple states.

ERIC requests that the Proposed Rules provide a narrower definition of family member that more closely mirrors the FMLA. A narrowed definition under the Proposed Rules than what is provided for under the WCL would not necessarily lead to greater confusion if the Proposed Rules clearly refer to the FMLA when defining family members for family leave and not disability benefits. We believe it should be the decision of employers on whether to expand the list of family members for whom an employee may take leave to care for above and beyond the federal floor established by the FMLA.

C. ***Close and Continuing Proximity Requirement.*** The Proposed Rules state that an employee must be in "close and continuing proximity" to the care recipient. This means being "present at the same location as the family member during the majority of" leave taken. New York's inclusion of this exact language is novel compared to the other three states that have enacted paid family leave laws, but it is not incorrect.

The U.S. Court of Appeals for the Ninth Circuit—which includes California—held in *Tellis v. Alaska Airlines, Inc.* (2005)[7] that "[c]ourts in this Circuit and other jurisdictions . . . have concluded a particular activity . . . [constitutes] 'caring for' a family member under the FMLA . . . only when the employee has been *in close and continuing proximity* to the ill family member."[8] In interpreting the Department of Labor's rules implementing the FMLA, the court in *Tellis* explained that providing physical and psychological care "involves some level of participation in ongoing treatment"[9] (i.e. there must be physical proximity).

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[4] *Id.* § 201(20).
[5] U.S. DEP'T OF LABOR, *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act* (July 2015), https://www.dol.gov/whd/regs/compliance/whdfs28f.htm.
[6] *Id.*
[7] Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005).
[8] *Id.* at 1047 (emphasis added).
[9] *Id.*

ERIC appreciates the inclusion of the proximity requirement as it mirrors what federal courts across the country are holding, but respectfully requests that it be revised or clarified to require "physical proximity." The U.S. Court of Appeals for the Fifth Circuit held in *Baham v. McLane Foodservice, Inc.* (2011)[10] that "merely remaining in frequent telephone contact with a relative while in another state [does not] constitute providing care for the purposes of the FMLA."[11] In *Baham*, the plaintiff was not only in a different state for more than two weeks and not with his daughter for whom he was caring, but was engaged in activities unrelated to her ongoing treatment.[12]

Taking the opinions of these courts into consideration, New York should revise the Proposed Rules to clarify what does and does not qualify as close and continuing proximity. At the very least, ERIC requests that the word "physical" be placed before proximity to better cement the idea.

D. ***Timing for Collection of Employee Contributions*****.** The Proposed Rules allow employers to begin collecting employee contributions for paid family leave coverage on July 1, 2017, but does not require it. The proposed regulations published by the State of New York Department of Financial Services states that the Superintendent has until June 1, 2017 to publish the community rate for premiums for the policy benefit period that is to begin on January 1, 2018 (i.e. the application date of the state's paid family leave program). We encourage the Superintendent to release the rates as soon as possible, hopefully, well before June 1, 2017. An employer in the State of New York must complete several steps to fully implement a paid family leave program. The steps include, but are not limited to: (1) request for proposal from several vendors who would oversee the program for the employer; (2) a review of the proposals; (3) contract negotiation with prospective vendors; (4) implementation of the program with the vendor: (5) update payroll process and procedures; and (6) update human resources policies. These steps, which is not a complete list of all actions that will need to be taken to implement the program, will take several months for an employer to complete. Most brokers/insurance providers will most likely not engage with employers until the rates are released, thus, it is likely not until Fall 2017 that employers will be able to commence with employee contribution deductions.

IV. CONCLUSION

ERIC appreciates the opportunity to provide comments on the Proposed Rules. We understand New York's goal of providing family leave benefits to its workers, and seek only to ensure clarity of the Proposed Rules and consistent, uniform application of them.

If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400 or whansen@eric.org.

Sincerely,

[10] Baham v. McLane Foodservice, Inc., 431 Fed. Appx. 345 (5th Cir. 2011).
[11] *Id.* at 349.
[12] *Id.*

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