ERIC The ERISA Industry Committee
Driven By and For Large Employers
1400 L Street, NW, Suite 350, Washington, DC 20005 • (202) 789-1400 • www.eric.org
Bryan Hum, Associate for Retirement & Compensation Policy

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

RE: Workers' Compensation Board Revised Proposed Regulations for Paid Family Leave

Ladies and Gentlemen:

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

I. ERIC'S INTEREST IN THE ANNOUNCEMENT

ERIC is grateful for the opportunity to provide a second round of comments on the revised Proposed Rules for the State of New York's Paid Family Leave program. The revisions made between the first and second set of proposed rules are a step in the right direction, but the Workers' Compensation Board can go further in ensuring the greatest amount of clarity for both employers and employees.

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, and therefore we have a strong interest in proposals, such as New York's Proposed Rules, that would affect its members' ability to provide quality and uniform paid leave benefits to tens of millions of workers and their families.

II. SUMMARY OF COMMENTS

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

1. For employees who acquire eligibility during employment, the threshold number of hours worked per week should be increased to 30 hours of service. This will better maintain the distinction between full and part-time employees, without expressly doing so, while accounting for flexible work arrangements.

2. The definition for family members, the recipients an employee may use leave to care for, is without a formal definition in the Proposed Rules. Federal law only requires that employers provide leave for employees to care for a child, spouse, or parent under the Family and Medical Leave Act of 1993. The Proposed Rules reach further than this in certain instances, creating a patchwork effect with subsequent compliance burdens on 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." Federal circuit courts have held that proximity must be physical and not via electronic means. Adding the word "physical" would strengthen the findings of these courts and maintain uniformity with the rest of the country.

III. DISCUSSION

A. *Part-Time Employee Coverage.*

The Proposed Rules have eliminated the distinction between full and part-time employees, and have instead implemented a 20-hour test for employees. ERIC appreciates this revision from the first set of proposed rules, because it is more workable and better accounts for flexible work arrangements such as compressed work schedules, telecommuting, or job-sharing programs.

That being said, ERIC would encourage the Workers' Compensation Board to increase the threshold to 30 hours of service. So, if an employee has a regular employment schedule of 30 or more hours per week then he or she will become eligible for family leave benefits after 26 consecutive weeks of work; and, similarly, if an employee has a schedule of less than 30 hours of week then eligibility will occur after 175 days.

Increasing the hour threshold would allow employers to maintain continuity and uniformity in how they provide full and part-time workers with leave benefits. The 30-hour figure is based on the IRS's definition of a full-time employee.[1] This figure is reasonable as it does not rise to the level of a full, 40-hour workweek, but does raise the bar so as not to be overbroad and over inclusive in its application to an employer's workforce.

B. *Definition of Family Member.*

The Proposed Rules define care recipients as "the family member receiving care from the employee taking paid family leave." The rules, however, do not go one step further and properly define who is a covered or eligible family member.

[1] *Identifying Full-Time Employees*, IRS, https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees (last updated Mar. 14, 2017).

The State of New York's Workers' Compensation Law defines family member as a child, parent, grandparent, grandchild, spouse, or domestic partner.[2] This set of individuals is also what is provided for on the Paid Family Leave webpage. There is, however, a disconnect between the Proposed Rules and federal law, as well as between different sections within the Proposed Rules.

First, the Family and Medical Leave Act of 1993 (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. A parent-in-law, grandchild, and grandparent do not qualify under the FMLA as a person an employee can take leave for, unless he or she stood in *loco parentis* to the employee or fell within another applicable definition. New York should be hesitant to break from well-established federal law that has been applied uniformly and consistently across all states.

Second, there is an inconsistency between the laws being relied on within the Proposed Rules with regard to eligible uses for leave. On its face, the Proposed Rules allow employees to take leave to provide care for extended family members, but restrict leave for qualifying exigencies arising from the service of a family member in the armed forces to nuclear family members only. The latter cites and relies on the FMLA, whereas the former makes no reference to the statute at all. The Workers' Compensation Board must work to bring these two sections into alignment with one another since the class of people being discussed, i.e. family members, do not match. To do this, ERIC requests that the Proposed Rules provide a formal definition for "family members" that mirrors the FMLA. ERIC supports use of the FMLA as a base, as does the Proposed Rules in some respect, and believes that employers should have the choice and flexibility to go beyond its requirements based on their workforce and industry practice. Forcing employers to do more than what is federally mandated creates a patchwork of laws, both within and across states, which is a substantial compliance burden for large, multistate employers.

C. Close and Continuing Proximity Requirement.

The Proposed Rules continue to 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. ERIC supports use of such a requirement as it has been found to be valid by several circuit courts of appeal.

The U.S. Court of Appeals for the Ninth Circuit held in *Tellis v. Alaska Airlines, Inc.* (2005)[3] 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."[4] In interpreting the Department of Labor's rules, the court in *Tellis* explained that providing physical and psychological care "involves some level of participation in ongoing treatment"[5] (i.e. there must be physical

[2] N.Y. WORKERS' COMP. LAW § 201(20).
[3] Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005).
[4] *Id.* at 1047 (emphasis added).
[5] *Id.*

proximity). 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)[6] 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."[7] 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.[8]

Taking the opinions of these courts into consideration, the Workers' Compensation Board should revise the Proposed Rules to place the word "physical" before proximity to better cement the idea.

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 bhum@eric.org.

Sincerely,

Bryan Hum
Associate, Retirement & Compensation Policy

[6] Baham v. McLane Foodservice, Inc., 431 Fed. Appx. 345 (5th Cir. 2011).
[7] *Id.* at 349.
[8] *Id.*