



New York Farm Bureau • 159 Wolf Road P.O. Box 5330 • Albany, New York 12205 • (518) 436-8495 Fax: (518) 431-5656 • www.nyfb.org

April 7, 2017

Ms. Heather MacMaster
Workers' Compensation Board
Office of General Counsel
328 State Street
Schenectady, NY 12305-2318

RE: Proposed Rule Making: Chapter V of 12 NYCRR, Parts 355, 360, 361, 276, 380, Paid Family Leave, WCB-08-17-00010-P

Dear Ms. MacMaster,

New York Farm Bureau (NYFB), the State's largest general agricultural advocacy organization, appreciates the opportunity to comment on the Workers' Compensation Board's proposed rules on Paid Family Leave that outlines the regulations on how the program will function and outlines the eligibility requirements in order to take paid family leave. NYFB seeks clarification and guidance on several aspects of the proposed rule.

NYFB appreciates the clarification it received from Mike Lombardi, an Excelsior fellow in the Office of General Counsel at the Workers' Compensation Board, regarding the eligibility of farm workers as it relates to Paid Family Leave eligibility. NYFB had inquired if farm workers would be exempt from Paid Family Leave payroll deductions and benefits based on the definition of employment from Section 201 of the Worker's Compensation Law and 12 NYCRR 355.3.

Workers' Compensation Law § 201. Definitions. As used in this article:
6. "Employment." A. "Employment" means employment in any trade, business or occupation carried on by an employer, **except that the following shall not be deemed employment under this article:** services performed for the state, a municipal corporation, local governmental agency, other political subdivision or public authority; employment subject to the federal railroad unemployment insurance act; service performed on or as an officer or member of the crew of a vessel on the navigable water of the United States or outside the United States; **service as farm laborers;** casual employment and the first forty-five days of extra employment of employees not regularly in employment as otherwise defined herein; service as golf caddies; and service during all or any part of the school year or regular vacation periods as a part-time worker of any person actually in regular attendance during the day time as a student in an elementary or secondary school.

12 CRR-NY 355.3- Employment

(g) The following are excluded from the definition of employment:

- (1) Services performed for the State, a municipal corporation, a local governmental agency or other political subdivision or public authority, except that, pursuant to section 212 of the Workers' Compensation Law, a public authority, municipal corporation, fire district or other political subdivision may elect to become a covered employer.
- (2) Employment subject to the Federal Railroad Unemployment Insurance Act.
- (3) Service performed as an officer or member of the crew of a vessel and service performed on a vessel by any other person who is also eligible for wages, maintenance and care under the General Maritime Law.
- (4) Service as a farm laborer.
- (5) Services as golf caddies.
- (6) Casual employment.

Based on the information provided by Mr. Lombardi and the Workers' Compensation Law, it is NYFB's interpretation that those employees who are engaged in work as farm laborers would be exempt from Paid Family Leave.

Mr. Lombardi further clarified that "an employer who is not covered can voluntarily become covered for disability benefits, or for disability and paid family leave benefits, through the same process in section 212(1) of the Workers' Compensation Law." NYFB was also cautioned "When it comes to an individual employee's duties, the best guidance is on the website. If the employer currently has to cover someone for disability, then they will for paid family leave. This simple approach does not work though if the employer is currently only voluntarily covering the employee for disability. Under 12 NYCRR 355.3, if it is contested, the burden of proving an employee is not in covered employment is on the employer."

Even though farm laborers are exempt from Paid Family Leave, farm employers often have employees that conduct other duties including retail or clerical staff that would be subject to Paid Family Leave. In addition, some farm employers may elect to have their employees covered by Paid Family Leave. NYFB seeks clarification on different parts of the regulation that will impact these employers.

380-2.2 Leave for birth, adoption, or foster care.

Part c allows individuals to receive disability and family leave benefits after the birth of a child. When fully implemented, this would enable an individual to take a minimum of 18 weeks consecutively, which could create a hardship for an employer to be able to find temporary help to fill the position. In a farm retail store, a farmer would have to find someone else to fill the position temporarily while the other individual was out on leave.

380-2.5 Employees Who Acquire Eligibility During Employment

Part d allows employees who have vacation or sick leave the ability to not use this leave before seeking Paid Family Leave benefits. The employee can choose that they want to do with their accrued leave time, and an employer is not able to set a policy, as it can under the FMLA, requiring that an employee use up paid time first. The concern becomes that in addition to taking 12 weeks leave and then taking a week vacation and several sick days puts a burden on the employer to try to cover the work of the employee for an extended period.

380-2.6 Family Leave Waiver

While NYFB appreciates the ability for those individuals who work less than 26 weeks or 175 days in a 52-consecutive week period to file a waiver to exempt themselves from obligations for contributions to the cost of family leave benefits, the burden for exempting the employee falls to the employer. This adds another form that the employer will need to furnish at the time of hiring and add to the recordkeeping. We request that instead of having an additional waiver to sign that the employer simply need to keep records on the number of days an employee has worked and verify that the employee remains under the family leave threshold.

380-2.8 Fifty-two consecutive weeks

From NYFB's interpretation, this section would provide a retroactive look back of 52 weeks for which an employee could take family leave from the beginning of the Paid Family Leave Program. This means that employees could begin taking family leave benefits when the program goes into effect on January 1, 2018 for family leave eligible conditions that occurred in 2017. This could create a burden for employers who are learning to manage how paid family leave will impact their business and to try to find temporary help for positions. NYFB requests that family leave benefits not be retroactive and the clock for eligibility begin on January 1, 2018.

380-3.1 Employee notice requirements for PFL leave.

NYFB appreciates the inclusion of a 30-day advance notice for foreseeable leave as this will provide employers time either find temporary employees or develop a plan to cover the workload of the individual on leave. NYFB also supports notice to employers by employees of any changes to scheduled leave.

380-3.2 Content of notice to employer.

Part b states that when an employee seeks leave for the first time, the employee doesn't need to expressly assert rights under PFL or even mention family leave, it is the employer who must seek information from the employee to determine if paid family leave is being sought by the employee. NYFB believes that if an employee is seeking paid family leave, the employee, not the employer, must provide information on the need for paid family leave. By requiring an employer to request information from an employee may require the employer to ask personal questions of an employee.

380-5.6 Methods of payment of paid family leave benefits

The regulations propose the ability to pay benefits through three different means including debit card, direct deposit, or check. The regulations then provide a definition of each method of payment. NYFB questions the Workers' Compensation Board's ability to allow benefits to be paid through debit cards since the Department of Labor's rule on the methods of payment of wages, including debit cards, was revoked by the New York Industrial Board of Appeals.

380-8.1 Reinstatement

Part a requires that a covered employee who has received leave benefits must be reinstated to their employment. NYFB seeks clarification regarding seasonal workers who meet the threshold for paid family leave benefits (26 weeks or 175 days) and take leave but their seasonal position ends during the time they may be taking leave. Example: An employee is hired to work full time in the retail portion of winery for 9 months out of the year and takes 8 weeks of leave after 7 months of employment. After the 8 weeks of leave are over, the employee doesn't not return to their job because the agreed upon employment term has expired. Would the employer be under any obligation to reinstate the individual to the job or similar position? Additionally, would the

individual be able to take any recourse against the employer? NYFB would hope that the employer would not be liable to providing a position if both parties had agreed to the terms of employment.

380-10.2 Voluntary coverage for family leave when already providing voluntary disability benefits coverage.

NYFB appreciates the fact that farm employers have the option to voluntarily seek coverage under the Paid Family Leave program if they deem it appropriate for their farm laborers.

NYFB thanks the Workers' Compensation Board for the opportunity to submit these comments on the proposed regulations on Paid Family Leave.

Sincerely,

A handwritten signature in cursive script that reads "Lauren Williams".

Lauren Williams
Associate Director of Public Policy