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INFORMATION MEMO
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New York Publishes Revised Proposed Regulations for Paid Family Leave

On May 24, 2017, the New York Workers' Compensation Board (the "Board") issued another set of proposed regulations implementing the New York Paid Family Leave Law (PFL). The initial proposed regulations were published on February 22, 2017, as discussed in the March 13, 2017 New York Labor and Employment Law Report. During the comment period that followed, the Board received 117 formal comments. With the newly proposed regulations, the Board provided a detailed assessment of those comments and its responses. The release of the new proposed regulations opens a new 30-day comment period.

The new proposed regulations contain very few revisions of significance. There are many minor changes, but no major changes to the overall scheme of the program. A few aspects of the commentary and changes are worth noting:

- The regulations were revised to allow an employer to charge an employee's accrued paid leave "in accordance with the provisions of the FMLA" when FMLA is run concurrently with PFL. It appears that the intent was to allow an employer to require an employee who takes concurrent FMLA and PFL leave to use accrued paid time off. Recall, under the earlier regulations, an employer was prohibited from requiring an employee to use accrued paid time off. The problem is that the new proposed language says "in accordance with the FMLA" and under the FMLA framework, while employers are generally permitted to force the substitution of accrued paid leave, they are prohibited from doing so when an employee is concurrently receiving disability or workers' compensation benefits. This is because such benefits are paid, rendering the FMLA substitution provisions inapplicable. PFL, like disability and workers' compensation, is a form of "paid" leave. Thus, it could be argued that the FMLA rule allowing for employers to force the use of paid leave may be inapplicable. This is just one example of the complex interplay between the state and federal statutes that employers will be required to carefully work through when developing new leave policies. Hopefully, the Board will provide additional guidance to clarify this issue.

- The PFL eligibility criteria has been updated so that the eligibility of employees who work 20 hours or more per week is measured based on number of ***weeks*** in employment, which must be at least 26, and the eligibility of employees who work less than 20 hours per week is measured based on the number of ***days*** worked, which must be at least 175. The earlier regulations considered any employee who worked less than five days per week to be part-time and required the employee to have worked 175 days of employment to be eligible for PFL. This revision takes into account that some full-time employees work longer days for fewer than five days a week, and allows them to become eligible after 26 weeks, rather than 175 days.

- The proposed regulations were revised to clarify that an employee using intermittent leave must give the employer separate notice for each day of PFL. This change is important because the prior set of proposed regulations permitted employees who wanted to take intermittent PFL to only provide notice to the employer once. This is inconsistent with what is required under the FMLA and would have caused issues when FMLA and PFL are run concurrently.

- Comments from unionized employers called for "more detail about how a collectively bargained plan can take the place of an employer plan, and which sections of the regulations can be changed by agreement, and which cannot." While the Board made no changes to the proposed regulations, it points to Section 211(5) of the Workers' Compensation Law (governing disability benefits) and explains that an employer and union must apply to the Board in order to have a CBA fulfill the

employer's PFL responsibility, and that an assessment must be paid to the Board. It also added two examples of the types of rules than can be changed by agreement. First, unionized employees can establish eligibility through time worked at any employer covered by the CBA. Second, the CBA can provide that the union, not the employer, be responsible for time records and payroll deductions. Notably, as stated in our earlier blog article, the collectively bargained plan must provide benefits at least as favorable as the PFL law, including the length of leave and amount of payment. This requirement may make it unlikely that existing or future CBAs qualify for an exemption from this law.

- Lastly, although no change was made to the proposed regulations, the Board addressed concerns about employers starting to take payroll deductions on July 1, 2017 when the PFL law does not go into effect until January 1, 2018. The Board noted that because the law establishes January 1, 2018 as the date upon which benefit payments begin, it is necessary that employers be permitted to take payroll deductions in advance to offset the cost of acquiring the mandated insurance policies. (The Department of Financial Services has been tasked with setting the maximum employee contribution by June 1st). The bottom line is that employers are allowed, but not required, to start taking payroll deductions on July 1, 2017. If an employer chooses not to do so, the employer will not be able to take deductions in excess of the maximum weekly contribution to retroactively cover the cost of providing PFL benefits.

Bond's team of employment attorneys will continue to study these proposed regulations and provide additional analysis on this blog. Given the paucity of significant changes from the originally proposed regulations to the regulations proposed yesterday, we expect the final regulations will very closely mirror these proposed regulations. Therefore, employers should soon begin the process of drafting new policies so that they are ready for roll out in advance of the January 1, 2018 effective date.

If you have any questions about this Information Memo, please contact Kerry W. Langan, Kristen E. Smith or any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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