

**CONTACT**

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)

ELIZABETH KOCIENDA

212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)

**COMMENTS OF THE SEX AND LAW COMMITTEE REGARDING  
NEW YORK STATE WORKERS' COMPENSATION BOARD  
PROPOSED PAID FAMILY LEAVE REGULATIONS**

We are writing to submit comments on the proposed regulations regarding family leave benefits coverage. We thank you for the opportunity to comment on these proposed regulations.<sup>1</sup>

The Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace and civic life and to promote respect for the rule of law. The Committee's members work and practice in a wide range of areas, including, violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. Because the New York paid family leave program will have significant impacts on the lives and status of women in New York, we are well positioned to comment on the proposed regulations.

**We support the inclusion of the following provisions:**

**Leave prior to formal placement for adoption (12 NYCRR § 380-2.2(a))**

We are pleased that the proposed regulations would allow parents seeking to adopt a child to take family leave prior to official placement for adoption in order to attend to various needs related to the adoption process. Because the process of adopting a child can be lengthy and require time away from work to complete important preliminary steps, this provision will relieve some of the pressure on workers seeking to become parents to an adopted child.

**Bonding leave for children born or placed prior to January 1, 2018 (12 NYCRR § 380-2.7)**

We are equally pleased to see that under the proposed regulations parents who welcome a new child prior to January 1, 2018 will be able to take paid family leave beginning on that date, so long as the leave occurs within one year of the child's birth or placement for adoption or foster care. This provision will fulfill the promise of the law and be immeasurably appreciated by the growing families who benefit from it.

**Claims process (Subpart 380-5)**

---

<sup>1</sup> Molly Weston Williamson, a member of the Sex and Law Committee, was the primary drafter of these comments, which draw from model comments issued by A Better Balance, and which have been reviewed, revised and adopted by the Committee.

The regulations lay out a well-designed process for filing a claim. In particular, the proposed regulations ensure that workers will not be deprived of their rights because their employers delayed completing (12 NYCRR § 380-5.1(a)) or failed to fully complete (12 NYCRR § 380-5.4(e)) the necessary paperwork. In addition, insurance carriers will be required to process claims in a timely manner (12 NYCRR § 380-5.4(a)) and to clearly communicate with workers regarding any missing needed information (12 NYCRR § 380-5.4(c)) to prevent paperwork problems from depriving workers of benefits. Allowing workers to pre-file for benefits (12 NYCRR § 380-5.3) will be especially helpful for new parents, who will be able to spend their bonding time focused on their new child rather than filling out forms. We fully support the requirement that insurance carriers communicate with workers in the workers' preferred language (12 NYCRR § 380-5.4(h)).

#### **Payment method for paid family leave benefits (12 NYCRR §§ 380-5.6 through 380-5.11)**

The proposed regulations regarding method of payment are thoughtful and offer important provisions to ensure that workers, including low-income workers who may face additional hurdles, receive benefits in a manner that works for them. Insurance carriers will be able to provide benefits via debit card, but only if the cards meet strict requirements that guarantee workers can access benefits conveniently and without added costs, or by direct deposit. As a safeguard, workers will always be able to receive benefits by check if needed (12 NYCRR § 380-5.8) and cannot be penalized for opting not to use a debit card or direct deposit (12 NYCRR § 380-5.10). Taken together, these provisions will provide a smooth, accessible, and reliable benefits payment process for all workers, including those without reliable bank access.

#### **Employer obligations (12 NYCRR § 380-7.2)**

Because employers are a critical source of information for workers on their rights, we are pleased to see the proposed regulations would require employers to provide workers with written information about their rights, including how to file a claim (12 NYCRR § 380-7.2(a)). We are also glad to see the regulations restate the statutory requirement that employers post a printed notice of rights in plain view of all employees (12 NYCRR § 380-7.2(e)).

#### **We support the following provisions, with suggested modifications:**

##### **Serious health condition (12 NYCRR § 355.9(16))**

The proposed regulations regarding serious health conditions, which closely mirror the regulations under the federal Family and Medical Leave Act, offer important protections for families facing a variety of health needs. In addition to the current language, we suggest explicitly including treatment for substance abuse, similar to 29 C.F.R. § 825.119. We also suggest adding language making explicit that gender confirming surgery constitutes a serious health condition<sup>2</sup> for purposes of the law.

---

<sup>2</sup> “Serious health condition” is defined, in relevant part, as “an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility, continuing treatment or continuing supervision by a health care provider.” N.Y. Workers’ Comp. Law § 201(18).

### **Rights of workers eligible for both temporary disability insurance and paid family leave (12 NYCRR § 380-2.2(c))**

The current proposed regulations state that “[a]n eligible employee may opt to receive disability and family leave benefits during the post-partum period but may not receive both benefits at the same time.” We applaud the inclusion of this provision as an important step to ensure that workers who give birth maintain their full rights to both temporary disability insurance benefits for recovery from childbirth and paid family leave to bond with their new child. In order to make this principle even clearer, we suggest substituting the following similar but more explicit language: “An employee who is eligible for both family leave and disability benefits, including due to the birth of a child, may choose whether to receive both benefits but may not receive both benefits at the same time.”

### **Employee notice requirements (Subpart 380-3)**

The proposed regulations regarding employees’ obligations to provide notice to their employers of their need for paid family leave generally provide a fair and sensible set of requirements to ensure employers (and, by extension, insurance carriers) receive the information they need. We are especially pleased that employees will not be required to use the words “paid family leave” in order to meet their notice obligations and, if there is ambiguity, the obligation will fall to employers to seek clarification (12 NYCRR § 380-3.2(b)).

However, we are concerned by the statements at various parts of the proposed regulations (including 12 NYCRR § 380-3.3 and 12 NYCRR § 380-3.5) that benefits can be partially or wholly denied for failure to comply with technical notice requirements. There is nothing in the paid family leave statute that permits denial of benefits to an employee on this basis. Indeed, as described above, the burden is on the employer to clarify any ambiguity in the notice provided by the employee, which clearly envisions that some attempt at clarity must take place under those circumstances, as opposed to outright denial. We urge the removal of any provisions that state or imply benefits can be denied, in whole or in part, for any reason not explicitly authorized in the statutory text.

### **Workers with more than one covered employer (12 NYCRR § 380-6.1(b))**

In today’s economy, many workers, especially low-wage workers, have multiple jobs in order to make ends meet. The proposed regulations wisely allow workers to choose whether to take leave from all such jobs when they have a qualifying event (such as the birth of a new child). This will allow workers to make the choices that are right for them and their families. In addition to the existing text, we suggest adding language to clarify how benefits will be calculated for workers with more than one job (whether they take leave from only one job or all covered jobs).

### **Continuation of health insurance (12 NYCRR § 380-7.4)**

New York’s paid family leave law took an important stand for workers by requiring that employers who provide health insurance to their workers must continue that insurance while the worker is on paid family leave, on the same terms as during employment. The proposed

regulations do an excellent job of fleshing out that requirement to ensure that no worker will lose coverage or face skyrocketing costs at a time when his or her family needs health care the most. We support the requirement (at 12 NYCRR § 380-7.10(d)) that employers who fail to continue coverage will be liable for any resulting medical bills, which should provide a strong incentive for employers to follow the law.

Although this approach is similar to the Family and Medical Leave Act (29 U.S.C. § 2614(c)), we suggest removing the first sentence (“In accordance with the Family and Medical Leave Act (29 U.S.C. Sections 2601-2654):”), in order to avoid any implication that only workers covered under the Family and Medical Leave Act are entitled to continuation of their health insurance.

### **Reinstatement to employment and related protections (Subpart 380-8)**

Providing full job protection to all covered workers is one of the landmark features of the New York paid family leave law. We are pleased that the regulations provide a clear and robust mechanism for workers to enforce this crucial right through the Workers’ Compensation Board. In particular, the proposed regulations make clear an employee’s absence from the workplace while on family leave can never be considered a valid reason for an employer’s illegal failure to reinstate a worker (12 NYCRR § 380-8.2(f)). Similarly, the proposed regulations establish that the burden is on the employer, not the employee, to show that an adverse action was not retaliatory (12 NYCRR § 380-8.2(e)). These provisions amply demonstrate the Board’s firm commitment to providing a robust and accessible process for enforcing workers’ rights under New York’s groundbreaking law.

We have some suggestions to make this process even stronger. First, the proposed regulations appear to require that employees file a formal request for reinstatement within 120 days of an employer’s failure to reinstate the employee to his or her job as a pre-requisite to filing a complaint with the Workers’ Compensation Board. This would, in effect, shorten the statute of limitations on beginning such a claim from two years (as specified in N.Y. Workers’ Compensation Law § 120) to four months. We suggest that this provision be removed, either by making the formal request process (proposed 12 NYCRR § 380-8.1) optional or by extending the deadline for filing such a request to match the statute’s two-year timeline.

Second, the proposed regulations offer substantial insight into how workers can exercise their rights under N.Y. Workers’ Compensation Law § 203-b, which provides an affirmative right to reinstatement after taking paid family leave. Because workers also have important rights under N.Y. Workers’ Compensation Law § 203-a (“Retaliatory action prohibited for family leave”) and N.Y. Workers’ Compensation Law § 203-c (“Health insurance during family leave”), we urge the Board to further specify how workers can exercise their rights under those provisions through the complaint process.

Finally, the regulations should specify what steps the Board will take to make the complaint process accessible to workers who speak languages other than English. Paralleling the strong commitments to language access in other parts of the proposed regulations, workers should be able to file all documents, communicate with the Board, and participate in hearings in their preferred language, with translation services from the Board as needed.

**We are concerned about the following provisions:**

**Timing of employee contributions (12 NYCRR § 380-2.4(d))**

The proposed regulations would allow, but not require, employers to begin withholding employee contributions to pay for paid family leave coverage on July 1, 2017. There is no obvious reason why this decision should be left to employers and, because employers are not obligated to acquire coverage until January 1, 2018, it is not clear what this money will be used for in the interim. In addition, this proposed language is inconsistent with N.Y. Workers' Compensation Law § 209(1), which states that employees shall contribute to the cost of family leave benefits "after January first, two thousand eighteen[.]" We urge you to reconsider this provision.

**Intermittent leave for part-time workers (12 NYCRR § 380-2.5(b)(1)(i))**

We are concerned by the inclusion of proposed language reducing the amount of paid family leave available to part-time workers, as compared to full-time workers, when they take leave on an intermittent basis. Under the statute (N.Y. Workers' Comp. Law § 204(2)), covered part-time workers are entitled to the exact same amount of paid family leave as all other covered workers; workers taking intermittent leave are entitled to the exact same cumulative amount of paid family leave as workers taking paid family leave in a single unit. The proposed language reducing the amount of leave available to part-time workers taking leave on an intermittent basis has no foundation in the law and would needlessly prevent part-time workers from taking paid family leave in the way that meets their families' needs. We urge you to remove this subsection.

**We suggest adding the following provision:**

**Codifying protection for immigrant workers**

We were pleased to see the "FAQs" section of the state website state that citizenship status and immigration status have no impact on paid family leave eligibility. This commitment, which is firmly consistent with the intent of the law, will have a major positive impact on New York's working families. In keeping with this position, we suggest adding language to the regulations stating that workers' immigration status has no effect on eligibility for protection and benefits under the law.

We appreciate the opportunity to submit these comments, and we hope you will give them consideration in your efforts to ensure that the New York paid family leave law is implemented effectively and clearly.

Sex and Law Committee  
Katharine Bodde, Chair

April 2017