

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
11 NYCRR 363
(INSURANCE REGULATION 211)**

**MINIMUM STANDARDS FOR THE FORM AND RATING OF FAMILY LEAVE BENEFITS
COVERAGE, INCLUDING THE ESTABLISHMENT AND OPERATION OF A RISK ADJUSTMENT
MECHANISM**

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law, Sections 301, 3201, 3217, 3221 and 4235 of the Insurance Law and Sections 204(2)(a), 208(2), and 209(3)(b) of the Workers' Compensation Law, do hereby promulgate Part 363 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 211), to take effect upon publication of the Notice of Adoption in the State Register, to read as follows:

The title of Chapter XIV of 11 NYCRR is amended by adding new wording, shown in underline, to read as follows:

**INDIVIDUAL AND SMALL GROUP HEALTH INSURANCE AND FAMILY LEAVE BENEFITS
COVERAGE**

(ALL OF THE FOLLOWING MATERIAL IS NEW)

Section 363.1 Preamble.

(a) As enacted by Part SS of Chapter 54 of the Laws of 2016, Insurance Law section 4235(n)(1) requires the superintendent, in consultation with the chair of the workers' compensation board, to determine by regulation whether family leave benefits coverage issued pursuant to Article 9 of the Workers' Compensation Law shall be experience rated or community rated. Pursuant to Insurance Law section 4235(n)(1), if the determination is made to community rate such coverage, then the regulation may also include subjecting the family leave benefits coverage to a risk adjustment mechanism.

(b) As enacted by Part SS of Chapter 54 of the Laws of 2016, Insurance Law section 4235(n)(1) also authorizes the superintendent to establish the rates for any community rated family leave benefits coverage and to apply commonly accepted actuarial principles to establish community rated family leave benefits coverage rates that are not excessive, inadequate or unfairly discriminatory.

(c) As enacted by Part SS of Chapter 54 of the Laws of 2016, Workers' Compensation Law section 209(3)(b) authorizes the superintendent to set the maximum employee contribution for family leave benefits coverage.

(d) This Part establishes that the family leave benefits coverage issued pursuant to Article 9 of the Workers' Compensation Law:

(1) shall be community rated; and

(2) may be subject to the risk adjustment mechanism as set forth in this Part.

The determination that family leave benefits coverage shall be community rated was made to promote a fair and efficient market for family leave benefits coverage. Community rating ensures that all employees are charged a rate based upon the same principles and are not subject to cost variations based upon age, gender, geographic location, or any other demographic factor. Community rating ensures that all employees are similarly treated. The determination that family leave benefits coverage may be subject to a risk adjustment mechanism was made to prevent issuers from experiencing disproportionate losses due to high utilization of benefits and also to eliminate any disincentives that the statewide community rate would have on the issuance of policies to employers with high utilization of benefits.

(e) This Part also sets forth:

(1) the procedures for establishing the community rate, the maximum employee contribution, and any risk adjustment mechanism; and

(2) the rules relating to the content and sale of policy forms for family leave benefits coverage.

(f) Pursuant to section 361.4 of Title 12, the requirements of this Part also apply to a self-funded employer, except that the requirement of section 363.5 of this Part shall not apply to a self-funded employer.

Section 363.2 Applicability.

(a) Pursuant to Workers' Compensation Law section 211, a covered employer shall provide family leave benefits to its employees in one or more of the following ways:

(1) by insuring and keeping insured the payment of such benefits with an issuer; or

(2) by self-funding, in which case, a covered employer shall furnish satisfactory proof to the chair of the workers' compensation board of the employer's financial ability to pay such benefits.

(b) This Part shall apply to family leave benefits and shall also apply to any policy.

(c) The requirements of this Part shall apply to an issuer provided, however, that the superintendent shall have the discretion to exempt the state insurance fund of this State from the requirements of section 363.5 of this Part if the superintendent finds that such exemption facilitates a fair and efficient market for family leave benefits coverage.

Section 363.3 Definitions.

As used in this Part:

(a) *Chair* shall mean the chair of the workers' compensation board of this State.

(b) *Community rated* means a rating methodology in which the premium for all persons covered by a policy is the same based on the wages of the covered person and the experience of the entire pool of risks covered by family leave benefits coverage in the state by all issuers and self-funded employers without regard to utilization

or expected utilization of the family leave benefits or any factor that may correlate with such utilization including, without limitation, age, gender, health status or occupation.

(c) *Covered employer* means an employer subject to Article 9 of the Workers' Compensation Law.

(d) *Earned premium* means the premium amounts due to issuers for family leave benefits coverage provided for a calendar year, without regard to when the premium is actually paid or collected.

(e) *Employee* means an employee or other self-employed person who is eligible for family leave benefits in accordance with Workers' Compensation Law section 203.

(f) *Family leave benefits* means the coverage for family leave set forth in Article 9 of the Workers' Compensation Law.

(g) *Incurred claims* means all paid claims and unpaid claims (reported and unreported) for family leave benefits coverage provided for a calendar year. Incurred claims for a calendar year shall be calculated as: claims paid during the current calendar year *plus* current end of year unpaid claim reserves *minus* end of year unpaid claim reserves for the prior calendar year *minus* amounts received by the issuer pursuant to section 380-7.7(f) of Title 12. For purposes of this calculation, end of year unpaid claim reserves shall be determined in accordance with Insurance Law section 1303.

(h) *Issuer* means:

(1) an authorized insurer writing a policy; and

(2) subject to 363.2(c) of this Part, the state insurance fund of this State.

(i) *Maximum employee contribution* means the maximum amount a covered employer is authorized to collect from each of its employees to fund the family leave benefits.

(j) *Policy* means a group accident and health insurance policy that provides family leave benefits.

(k) *Rate* means the premium rates determined by the superintendent in accordance with section 363.4(a)(3) of this Part.

(l) *Self-funded employer* means an employer providing family leave benefits in the manner authorized by Workers' Compensation Law section 211(3).

(m) *Statewide average weekly wage* means the average weekly wage of employees in this State for the previous calendar year as reported by the commissioner of labor of this State.

(n) *Statewide median weekly wage* means the median weekly wage of employees in this State for the previous calendar year as reported by the commissioner of labor of this State. In the absence of the commissioner of labor's report, the superintendent shall estimate the statewide median weekly wage using the available wage data as reported by the commissioner of labor of this State.

(o) *Wages* means the money rate at which employment with a covered employer is recompensed by the employer as more fully set forth in section 357.1 of Title 12 and in the case of a self-employed person, the person's self-employment income as defined in 26 U.S.C. §1402(b).

Section 363.4 Community Rating and Procedures for Establishing Rates.

(a) Community Rating.

(1) Pursuant to Insurance Law section 4235(n)(1), the superintendent, in consultation with the chair, has determined that family leave benefits coverage shall be community rated.

(2) The community rate for premiums shall be established by the superintendent and shall apply statewide to all policies.

(3) The community rate for premiums shall be set each year by the superintendent as a defined amount per week per employee. The superintendent may set the community rate for premiums as a defined dollar amount per employee or as a percentage of an employee's weekly wages. The superintendent may also utilize any one of the following three classification methodologies in setting the community rate for premiums:

(i) Classification Methodology One: The community rate for premiums may be set as three separate rates for employees earning an average weekly wage of:

(a) up to one-third of the statewide average weekly wage;

(b) more than one-third and up to two-thirds of the statewide average weekly wage; and

(c) more than two-thirds of the statewide average weekly wage.

(ii) Classification Methodology Two: The community rate for premiums may be set as two separate rates for employees earning an average weekly wage of:

(a) up to one-half of the statewide median weekly wage; and

(b) more than one-half of the statewide median weekly wage.

(iii) Classification Methodology Three: The community rate for premiums may be set using any other series of wage classifications based on an employee's weekly wages that the superintendent determines to reasonably differentiate employees based on their respective wages.

(4) In subparagraphs (i) or (ii) of paragraph (3) of this subdivision, the community rated premium or the maximum employee contribution paid by each employee shall be the amount that corresponds to the employee's average weekly wage.

(i) Except as provided in subparagraph (ii) of this paragraph, the employee's average weekly wage shall be calculated using the average weekly wage of the employee's previous 8 weeks of employment or portion thereof that the employee was in such employment with the same employer that is collecting the employee's

contribution. Once calculated for a calendar year, an employee's average weekly wage shall be applicable for the remainder of the calendar year unless the employee's wage rate, average numbers of work hours per week, or salary changes, in which case, the employee's average weekly wage shall be recalculated on a quarterly basis on January 1, April 1, July 1, and October 1.

(ii) In the case of a self-employed person, the average weekly wage for such person shall be the greater of the person's self-employment income, as defined in 26 U.S.C. §1402(b), for the previous full calendar year divided by 52 weeks, or the statewide average weekly wage. If there is not 52 weeks of self-employment income for the previous full calendar year, then the person's average weekly wage shall be the greater of the sum of the person's wages for the previous calendar plus the person's self-employment income, as defined in 26 U.S.C. §1402(b), divided by 52 weeks, or the statewide average weekly wage. Once calculated for a calendar year, a self-employed person's average weekly wage shall be applicable for the remainder of the calendar year.

(5) On or before June 1, 2017, and on or before September 1 of each year thereafter, the superintendent shall publish the community rate for premiums for the policy benefit period beginning on the following January 1. The community rate for premiums shall also be the maximum employee contribution regardless of whether the family leave benefits are provided by an issuer or a self-funded employer.

(b) Procedures for establishing rates.

(1) In accordance with Insurance Law section 4235(n)(1), in establishing the community rate for premiums, the superintendent shall apply commonly accepted actuarial principles to establish community rated family leave benefits coverage rates that are not excessive, inadequate or unfairly discriminatory.

(2) In establishing the community rate for premiums, the superintendent may use data collected for the previous calendar year from all issuers and self-funded employers. In addition to any information requested by the superintendent or the chair pursuant to Workers' Compensation Law section 208(2), issuers and self-funded employers shall report the data as required by section 363.8 of this Part.

(c) Rate submission requirements.

(1) Every issuer shall file and maintain a current rate manual of this State that includes the following information for a policy providing family leave benefits:

(i) the name of issuer and policy form number on each page;

(ii) a description of the benefits under the policy, separately describing the benefits provided pursuant to Workers' Compensation Law section 204(2) and any additional or enhanced benefits beyond those specified in section 204(2);

(iii) a schedule of the premium rates for any additional or enhanced benefits beyond those specified in Workers' Compensation Law section 204(2); and

(iv) a schedule of expenses as a percentage of premium, including administrative expenses, commissions, taxes, fees and expected profit.

(2) The information required by paragraph (1) of this subdivision shall be included in separate rate manual pages for each of the three group sizes referenced in section 363.5(g)(1) of this Part.

(3) The rate manual pages for family leave benefits shall be separately maintained from the rate manual pages for all other types of insurance including disability benefits provided pursuant to Article 9 of the Workers' Compensation Law.

(4) The rate manual pages shall be included as part of a rate filing submitted to the superintendent. The rate filing shall include an actuarial memorandum that includes justification of the schedules referenced in subparagraphs (iii) and (iv) of paragraph (1) of this subdivision, as applicable.

Section 363.5 Risk Adjustment.

(a) Pursuant to Insurance Law section 4235(n)(1) and (2), the superintendent, in consultation with the chair, has determined that the family leave benefits provided by issuers shall be subject to a risk adjustment mechanism for calendar year 2018.

(b) The superintendent, in consultation with the chair, may determine each year thereafter whether the family leave benefits coverage provided by issuers in subsequent years shall be subject to a risk adjustment mechanism. In making such determination, the superintendent shall consider whether a risk adjustment mechanism facilitates a fair and efficient market for family leave benefits coverage. Such determination shall be made on or before June 30 prior to the calendar year in which the determination is applicable or as soon as practicable thereafter.

(c) For each year that the superintendent determines that a risk adjustment mechanism is applicable, this section establishes the process that shall be used by the superintendent to equalize the per member per month claim amounts among issuers by group size in order to protect issuers from disproportionate adverse risks in accordance with Insurance Law section 4235(n)(3).

(d) Except as determined by the superintendent in accordance with section 363.2(c) of this Part, every issuer shall be required to participate in the family leave benefits risk adjustment mechanism established by this section.

(e) Self-funded employers shall not be subject to the risk adjustment mechanism established by this section.

(f) Administration of the risk adjustment mechanism. The risk adjustment mechanism established by this section shall be administered directly by the superintendent in consultation with the chair. However, the superintendent, in consultation with the chair, may employ a third party vendor to administer the risk adjustment mechanism.

(g) Risk adjustment equalization process.

(1) The risk adjustment mechanism established by this section shall utilize target loss ratios and shall equalize issuers' loss ratios across three separate group sizes. Group size shall be determined as of the date of policy issuance and, in subsequent years, as of the date of renewal. The three group sizes are as follows:

(i) Small Group: an employer with one to 49 employees;

- (ii) Medium Group: an employer with 50 to 499 employees; and
- (iii) Large Group: an employer with 500 or more employees.

(2) Where the family leave benefits coverage is provided in a policy issued to a trustee of a fund established or participated in by two or more employers (a multiple employer trust) in accordance with Insurance Law section 4235(c)(1)(D), the issuer shall use the total number of employees covered under the policy when reporting the information required by this section. The total number of employees covered under the policy issued to the multiple employer trust shall be used to determine group size in accordance with paragraph (1) of this subdivision.

(3) Every issuer shall separately calculate its loss ratio for family leave benefits for each group size referenced in paragraph (1) of this subdivision for the previous calendar year. For each group size, the loss ratio shall be calculated as of December 31 of such year using the following formula: total dollar amount of family leave incurred claims in the previous calendar year for all policies in the group size divided by the total dollar amount of earned premium in the previous calendar year for family leave benefits for all policies in the group size.

(4) All calculations required by this subdivision shall be performed annually for the previous calendar year and submitted to the superintendent by March 31.

(5) A single risk adjustment pool shall be established by the superintendent for each group size referenced in paragraph (1) of this subdivision. For each calendar year, the superintendent shall administer the risk adjustment mechanism in the following manner if the superintendent finds that using target loss ratios and the single risk adjustment pool mechanism set forth in this paragraph facilitate a fair and efficient market for family leave benefits coverage.

- (i) The initial target loss ratios for small groups, medium groups and large groups are as follows:
 - (a) 67 percent for small groups;
 - (b) 73 percent for medium groups; and
 - (c) 80 percent for large groups.

The superintendent may modify the initial target loss ratios for any year to promote a fair and efficient market for family leave benefits coverage.

(ii) Using the data collected from all issuers for the previous calendar year, the superintendent shall calculate the statewide target loss ratio using the following formula: the total dollar amount of earned premium in the previous calendar year for small groups multiplied by the initial target loss ratio as specified in clause (a) of subparagraph (i) of this paragraph, added to the total dollar amount of earned premium in the previous calendar year for medium groups multiplied by the initial target loss ratio as specified in clause (b) of subparagraph (i) of this paragraph, added to the total dollar amount of earned premium in the previous calendar year for large groups multiplied by the initial target loss ratio as specified in clause (c) of subparagraph (i) of this paragraph, divided by the total dollar amount of earned premium in the previous calendar year for all three group sizes.

(iii) Using the data collected from all issuers for the previous calendar year, the superintendent shall calculate the statewide actual loss ratio using the following formula: the total dollar amount of family leave incurred claims in the previous calendar year for all policies in all three group sizes divided by the total dollar amount of earned premium in the previous calendar year for family leave benefits for all policies in all three group sizes.

(iv) Using the loss ratios from subparagraphs (i), (ii) and (iii) of this paragraph, the final target loss ratios for small groups, medium groups and large groups shall be determined as follows:

(a) If the statewide target loss ratio equals the statewide actual loss ratio rounded to the nearest whole percent for the calendar year, then the final target loss ratios for small groups, medium groups and large groups shall be the initial target loss ratios referenced in subparagraph (i) of this paragraph.

(b) Subject to clause (a) of this subparagraph, if the statewide average target loss ratio is not equal to the statewide actual loss ratio for the calendar year, then the final target loss ratios for small groups, medium groups and large groups shall be calculated as follows:

(1) for small groups: the statewide actual loss ratio multiplied by the initial target loss ratio as specified in clause (a) of subdivision (i) of this paragraph divided by the statewide target loss ratio;

(2) for medium groups: the statewide actual loss ratio multiplied by the initial target loss ratio as specified in clause (b) of subparagraph (i) of this paragraph divided by the statewide target loss ratio; and

(3) for large groups: the statewide actual loss ratio multiplied by the initial target loss ratio as specified in clause (c) of subparagraph (i) of this paragraph divided by the statewide target loss ratio.

(v) Every small group issuer with a loss ratio that is lower than the final target loss ratio for small groups shall be required to make a payment into the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the payment into the risk adjustment pool shall be the amount necessary to raise the issuer's reported loss ratio to the final target loss ratio for small groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send a billing invoice to each such small group issuer required to make a payment into the risk adjustment pool.

(c) Each small group issuer shall submit its payment to the superintendent by July 31.

(d) Payments remitted by an issuer after July 31 shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due.

(vi) Every small group issuer with a loss ratio that is higher than the final target loss ratio for small groups shall collect a distribution from the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the distribution from the risk adjustment pool shall be the amount necessary to lower the small group issuer's reported loss ratio to the final target loss ratio for small groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send notification to each small group issuer of the amount that it will collect as a distribution from the risk adjustment pool.

(c) The superintendent shall make the distribution to each small group issuer by August 31 or as soon as practicable thereafter.

(vii) Every medium group issuer with a loss ratio that is lower than the final target loss ratio for medium groups shall be required to make a payment into the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the payment into the risk adjustment pool shall be the amount necessary to raise the issuer's reported loss ratio to the final target loss ratio for medium groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send a billing invoice to each such medium group issuer required to make a payment into the risk adjustment pool.

(c) Each medium group issuer shall submit its payment to the superintendent by July 31.

(d) Payments remitted by an issuer after July 31 shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due.

(viii) Every medium group issuer with a loss ratio that is higher than the final target loss ratio for medium groups shall collect a distribution from the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the distribution from the risk adjustment pool shall be the amount necessary to lower the medium group issuer's reported loss ratio to the final target loss ratio for medium groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send notification to each medium group issuer of the amount that it will collect as a distribution from the risk adjustment pool.

(c) The superintendent shall make the distribution to each medium group issuer by August 31 or as soon as practicable thereafter.

(ix) Every large group issuer with a loss ratio that is lower than the final target loss ratio for large groups shall be required to make a payment into the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the payment into the risk adjustment pool shall be the amount necessary to raise the issuer's reported loss ratio to the final target loss ratio for large groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send a billing invoice to each such large group issuer required to make a payment into the risk adjustment pool.

(c) Each large group issuer shall submit its payment to the superintendent by July 31.

(d) Payments remitted by an issuer after July 31 shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due.

(x) Every large group issuer with a loss ratio that is higher than the final target loss ratio for large groups shall collect a distribution from the risk adjustment pool in the amount specified by the superintendent.

(a) The amount of the distribution from the risk adjustment pool shall be the amount necessary to lower the large group issuer's reported loss ratio to the final target loss ratio for large groups by adjusting incurred claims.

(b) By July 1, the superintendent shall send notification to each large group issuer of the amount that it will collect as a distribution from the risk adjustment pool.

(c) The superintendent shall make the distribution to each large group issuer by August 31 or as soon as practicable thereafter.

(xi) If the payments received by the superintendent are less than the amounts payable, then the amount paid to each issuer shall be reduced by an amount calculated from the applicable pool as follows: the amount due to the issuer multiplied by the unpaid risk adjustment pool payments, divided by the total risk adjustment pool payments that should have been made.

(xii) The superintendent shall have the discretion to limit the payments from or the distributions to the state insurance fund of this State pursuant to this paragraph if the superintendent finds that such limitation facilitates a fair and efficient market for family leave benefits coverage.

(h) Audit mechanism.

(1) The superintendent may audit issuers each calendar year. In the event audits necessitate post-billing adjustments, the adjustments shall be charged or credited in the next year's risk adjustment payment or distribution. Additional payments due from any issuer whose conduct caused it to underpay, or refunds due back from any issuer whose conduct caused it to be overpaid shall include compound interest at the rate of one percent per month, or portion thereof, from the original due date or payment date. Any audit conducted pursuant to this section may include a review of the accuracy of the data reported and an issuer's claim management system.

(2) If the superintendent finds that any issuer has failed to accurately report data or failed to properly manage claims, then the superintendent may estimate the dollar amount of the impact that the errant data report or deficient claims management practice had on the amounts the issuer and all other issuers paid to or received from a risk adjustment pool. The superintendent may require an adjustment to be made by the issuer to the following year's risk adjustment payment or distribution to reflect the dollar amount of the impact of the issuer's conduct as estimated by the superintendent.

Section 363.6 Rules relating to the content and sale of policy forms for family leave benefits coverage.

(a) Except as provided in subdivision (b) of this section:

(1) every policy shall include coverage for both disability and family leave benefits;

(2) coverage for family leave benefits shall only be provided by rider to a group accident and health insurance policy providing disability benefits pursuant to Workers' Compensation Law Article 9; and

(3) coverage for family leave benefits shall renew or terminate as of the same renewal date or termination date of the policy providing disability benefits.

(b)(1) A group accident and health insurance policy providing only family leave benefits coverage may be issued to an employer providing disability benefits pursuant to Article 9 of the Workers' Compensation Law in the manner authorized by Workers' Compensation Law section 211(3). A group accident and health insurance policy providing only family leave benefits coverage may also be issued to an entity that elects to become a covered employer pursuant to Workers' Compensation Law section 212-a.

(2) A group accident and health insurance policy providing only disability benefits coverage may be issued to an entity that elects to become a covered employer pursuant to Workers' Compensation Law section 212(2) for the purpose of providing disability benefits and not family leave benefits.

(c) A group accident and health insurance policy providing family leave benefits shall comply with the requirements of Workers' Compensation Law Article 9.

(d) The content and format of the rider providing family leave benefits coverage may be prescribed by the superintendent.

(e) A group accident and health insurance policy providing family leave benefits shall also comply with the requirements of Part 52 of this Title (Insurance Regulation 62) and the regulations promulgated by the chair in Parts 360, 361, and 380 of Title 12.

(f) The qualifying events for eligible family leave are set forth in Workers' Compensation Law section 201(15).

(g) Each policy shall provide that regardless of the policy's issue date or renewal date, an increase in family leave benefits pursuant to Workers' Compensation Law section 204(2)(a) shall be effective as of the date specified in such section. However, the benefit payable to an employee during a period of family leave shall be at the

benefit amount and duration set forth in Workers' Compensation Law section 204(2)(a) that is in effect on the first day of family leave.

(h) Each policy shall provide that disability benefits pursuant to Workers' Compensation Law Article 9 and family leave benefits shall not be payable concurrently.

(i) Each policy shall provide that regardless of the policy's issue date or renewal date, the premium to be charged shall be based on the amount set by the superintendent for the applicable portion of the policy period.

(j) In accordance with Workers' Compensation Law section 212(4)(b), a sole proprietor, a member of a limited liability company, a member of a limited liability partnership, or other self-employed person may become a covered employer under Workers' Compensation Law Article 9 by complying with the provisions of Workers' Compensation Law section 212(1). A policy issued to such an employer on or before January 1, 2018 or within 26 weeks of when the employer first becomes a sole proprietor, a member of a limited liability company, a member of a limited liability partnership, or other self-employed person shall be issued at the applicable community rate for family leave benefits coverage. An issuer that issues a policy to such a sole proprietor, a member of a limited liability company, a member of a limited liability partnership, or other self-employed person after these time periods have passed shall subject the family leave benefits coverage to a waiting period of two years before such benefits may be payable. During the two year waiting period, the community rate for the family leave benefits coverage shall be payable.

(k) If an issuer opts to issue coverage to a sole proprietor with employees, a member of a limited liability company with employees, a member of a limited liability partnership with employees, or other self-employed person with employees, such policyholder shall be covered under the same policy that covers the policyholder's employees.

(l) Except as provided in subdivision (n) of this section, if an issuer elects to discontinue offering all coverage for disability and family leave benefits in one or more group sizes as referenced in subdivision (g)(1) of Section 363.5, then the issuer shall provide written notification of the proposed discontinuance to the superintendent at least 90 days prior to the date of discontinuance of such coverage. The written notification shall include the following information:

(1) the name of the issuer and the policy form numbers;

(2) an explanation of the reason for the discontinuance;

(3) whether the discontinuance will apply to policies issued to employers with one to 49 employees (small group), employers with 50 to 499 employees (medium group), employers with 500 or more employees (large group), or all employers regardless of group size;

(4) the date or dates that the issuer intends to mail or deliver notices of discontinuance to the covered employer, including a separate notice to employees to be distributed by the employer;

(5) for each group size as referenced in subdivision (g)(1) of section 363.5, the total number of groups and the total number of employees in each county impacted by the discontinuance;

(6) the intended discontinuance date and confirmation that the date is consistent with the terms of the policy being discontinued; and

(7) whether the discontinuance will be effectuated on each policy's renewal date.

(m) In addition to the notice required in subdivision (l) of this section, an issuer shall provide a written plan that is acceptable to the superintendent to minimize potential disruption in the marketplace as a result of the issuer's withdrawal from one or more group sizes as referenced in subdivision (g)(1) of Section 363.5.

(n) For an issuer that elects to discontinue offering coverage for disability benefits in this State for calendar year 2018, the notification to the superintendent required pursuant to subdivisions (l) and (m) of this section shall be provided to the superintendent by the later of July 1, 2017 or within 60 days of the date the superintendent publishes the community rate for premiums for family leave benefits coverage for the policy benefit period beginning on January 1, 2018.

(o) The sale or transfer of policies with disability and/or family leave benefits to another issuer shall be considered a discontinuance for the purposes of this section.

(p) Upon the approval of the superintendent and the chair, an issuer that discontinues offering all coverage for disability and family leave benefits in one or more group sizes as referenced in subdivision (g)(1) of section 363.5 in this State may re-enter such group size.

(q) Where a policyholder elects to provide additional or enhanced benefits beyond those specified in Workers' Compensation Law section 204(2), an issuer shall obtain from the prospective policyholder a certification that the policyholder will extend the protections of Workers' Compensation Law sections 203-b and 203-c for the additional or enhanced benefits. Such certification shall be included in the application form for the policy.

(r) Any additional or enhanced benefits for family leave benefits coverage beyond those specified in Workers' Compensation Law section 204(2) shall be set forth in the rider separately from the benefits specified in Workers' Compensation Law section 204(2), and shall comply with all additional guidance as issued by the Department on the subject.

(1) Additional or enhanced benefits shall be limited to an increased percentage in the weekly benefit amount and/or an increased duration of the benefit period specified in Workers' Compensation Law section 204(2).

(2) The application form for the policy shall affirmatively state that family leave benefits coverage is provided at the benefit amounts and duration required under Workers' Compensation Law section 204(2). Any additional or enhanced benefits must be elected separately on the application.

Section 363.7 Maximum employee contribution.

(a) In accordance with Workers' Compensation Law section 209(3)(b), the superintendent shall set the maximum employee contribution on or before June 1, 2017 and annually thereafter on or before September 1.

(b) Collection of the maximum employee contribution shall be done in accordance with the requirements set forth in Workers' Compensation Law section 209.

Section 363.8 Data collection.

(a) In addition to any information requested by the superintendent or the chair pursuant to Workers' Compensation Law section 208(2), an issuer or self-funded employer shall electronically submit the following data to the superintendent, in a manner prescribed by the superintendent:

(1) for each employer covered under a policy with family leave benefits and for each self-funded employer:

(i) identification of the group number, if applicable;

(ii) zip code of employer's location;

(iii) employer's SIC Industry code;

(iv) the group size as referenced in section 363.5(g)(1);

(v) the number of employees that are male and the number of employees that are female;

(vi) total earned premiums received for family leave benefits by the issuer or the total employee contributions received by the self-funded employer;

(vii) total amount of benefits paid for:

(a) family care pursuant to Workers' Compensation Law section 201(15)(a);

(b) bonding pursuant to Workers' Compensation Law section 201(15)(b); and

(c) a qualifying exigent circumstance pursuant to Workers' Compensation Law section 201(15)(c);
and

(viii) whether the employer provides any additional or enhanced family leave benefits beyond those specified in Workers' Compensation Law section 204(2) and, if so, a description of the additional or enhanced benefits.

(2) details for each claim for employees covered under a policy with family leave benefits and for each self-funded employer as follows:

(i) identification of the group number, if applicable, to which the employee belongs;

(ii) year of birth of the employee;

(iii) gender of the employee;

(iv) employee's annual wages;

(v) zip code of employee's residence; and

(vi) type of claim:

(a) for family care pursuant to Workers' Compensation Law section 201(15)(a):

(1) identify the familial relationship of the family member to the employee;

(2) date family leave benefits commenced;

(3) the total number of days for which benefits were paid;

(4) total amount of benefits paid; and

(5) if applicable, a description of any additional or enhanced family leave benefits and amounts paid to the employee beyond those specified in Workers' Compensation Law section 204(2).

(b) for bonding pursuant to Workers' Compensation Law section 201(15)(b):

(1) identify the event (i.e., birth, placement for adoption, or placement for foster care) giving rise to the claim;

(2) identify the date of birth, or date of placement for adoption or foster care;

(3) date family leave benefits commenced;

(4) the total number of days for which benefits were paid;

(5) total amount of benefits paid; and

(6) if applicable, a description of any additional or enhanced family leave benefits and amounts paid to the employee beyond those specified in Workers' Compensation Law section 204(2).

(c) for a qualifying exigent circumstance pursuant to Workers' Compensation Law section 201(15)(c):

(1) date family leave benefits commenced;

(2) the total number of days for which benefits were paid;

(3) total amount of benefits paid; and

(4) if applicable, a description of any additional or enhanced family leave benefits and amounts paid to the employee beyond those specified in Workers' Compensation Law section 204(2).

(3) Each issuer shall also report electronically the following data separately for each of the three group sizes referenced in subdivision (g)(1) of section 363.5 of this Part:

(i) Earned premiums due to the issuer for family leave benefits provided for the period subject to the data submission, without regard to when the premium is actually paid or collected; and

(ii) Incurred claims (separately reporting paid claims, current reserve amount, and change in reserves from the beginning of the reporting year).

(4) In addition to the information provided pursuant to paragraphs (1), (2), and (3) of this subdivision, an issuer or self-funded employer shall submit electronically any other data requested by the superintendent.

(5) The data submissions made in accordance with paragraphs (1) and (2) of this subdivision shall be provided by each issuer and self-funded employer every quarter to the superintendent as follows: the data submissions for January 1 through March 31 shall be submitted by April 30; the data submissions for April 1 through June 30 shall be submitted by July 31; the data submissions for July 1 through September 30 shall be submitted by October 31; the data submissions for October 1 through December 31 shall be submitted by January 31 of the of the following year.

(6) The data submissions made in accordance with paragraph (3) of this subdivision shall be provided by each issuer every quarter to the superintendent as follows: the data submissions for January 1 through March 31 shall be submitted by April 30; the data submissions for April 1 through June 30 shall be submitted by July 31; the data submissions for July 1 through September 30 shall be submitted by October 31; the data submissions for October 1 through December 31 shall be submitted by March 31 of the of the following year.

(7) The data submissions made in accordance with this subdivision shall be:

(i) cumulative through all quarters in a calendar year;

(ii) with the exception of the data reported pursuant to subparagraphs (1)(viii), (2)(vi)(a)(5), (2)(vi)(b)(6), (2)(vi)(c)(4) of this subdivision, limited to the maximum benefit and maximum duration specified in Workers' Compensation Law section 204(2), provided that any additional or enhanced benefits beyond those specified in Workers' Compensation Law section 204(2) shall not be included in the data submission; and

(iii) signed by an officer of the issuer or self-funded employer attesting to the best of his or her knowledge and belief that the data provided is accurate.

(8) Every issuer shall also submit to the superintendent the loss ratio calculations required by section 363.5(g) of this Part.

(b) Audit mechanism. The superintendent may audit the data submissions of issuers each calendar year. An issuer shall cooperate with the superintendent in providing information necessary to ensure the accuracy of the data reported to the superintendent or to any third party vendor selected by the superintendent.

Section 363.9 Exemptions from electronic filing and submission requirements.

(a) An issuer or self-funded employer required to make an electronic filing or a submission pursuant to this Part may apply to the superintendent for an exemption from the requirement that the filing or submission be electronic by submitting a written request to the superintendent for approval at least 30 days before the issuer or self-funded employer shall submit to the superintendent the particular filing or submission that is the subject of the request.

(b) The request for an exemption shall:

(1) set forth the issuer's National Association of Insurance Commissioners number;

(2) identify the specific filing or submission for which the issuer or self-funded employer is applying for the exemption;

(3) specify whether the issuer or self-funded employer is making the request for an exemption based upon undue hardship, impracticability, or good cause, and set forth a detailed explanation as to the reason that the superintendent should approve the request; and

(4) specify whether the request for an exemption extends to future filings or submissions, in addition to the specific filing or submission identified in paragraph (2) of this subdivision.

(c) The issuer or self-funded employer requesting an exemption shall submit, upon the superintendent's request, any additional information necessary for the superintendent to evaluate the issuer or self-funded employer's request for an exemption.

(d) The issuer or self-funded employer shall be exempt from the electronic filing or submission requirement upon the superintendent's written determination so exempting the issuer or self-funded employer, where the determination specifies the basis upon which the superintendent is granting or denying the request and to which filings or submissions the exemption applies.

(e) If the superintendent approves an issuer's or self-funded employer's request for an exemption from the electronic filing or submission requirement, then the issuer or self-funded employer shall make a filing in a form and manner acceptable to the superintendent.

Section 363.10 Authority of the Superintendent.

(a) In addition to the audit authority under sections 363.5(h) and 363.8(b) of this Part, the superintendent shall utilize all additional statutory and regulatory authority to ensure compliance with this Part and all other provisions of Part SS of Chapter 54 of the Laws of 2016.

(b) In accordance with Workers' Compensation Law section 226(9) and section 363.6(a) of this Part, every policy shall include coverage for both disability and family leave benefits coverage. Every issuer shall separately maintain its experience for family leave benefits and for disability benefits provided pursuant to Workers' Compensation Law Article 9. Where an issuer's experience for its disability benefits results in a loss ratio below

that required by section 52.45(f) of this Title (Insurance Regulation 62), the superintendent may take into account the special and unique value to the public of the combined policy for disability and family leave benefits in considering whether the standards of section 52.45(f) may be modified pursuant to section 52.45(g) of this Title.



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

I, Maria T. Vullo, Superintendent of Financial Services, do hereby certify that the foregoing is the new Part 363 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 211), promulgated by me on May 16, 2017, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law, Sections 301, 3201, 3217, 3221 and 4235 of the Insurance Law and Sections 204(2)(a), 208(2), and 209(3)(b) of the Workers' Compensation Law, to take effect upon publication of the Notice of Adoption in the State Register.

Pursuant to the provisions in the State Administrative Procedure Act, prior notice of the proposed regulation was published in the State Register on February 22, 2017. No other publication or prior notice is required by statute.

A handwritten signature in cursive script, appearing to read "Maria T. Vullo", written over a horizontal line.

Maria T. Vullo
Superintendent of Financial Services

Date: May 16, 2017