

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
11 NYCRR 365
(INSURANCE REGULATION 217)**

PAID FAMILY LEAVE COVID-19 RISK ADJUSTMENT MECHANISM

I, Linda A. Lacewell, Superintendent of Financial Services, pursuant to the authority granted by Chapter 25 of the Laws of 2020, 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 new Part 365 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 217), to take effect upon publication of the Notice of Adoption in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

Section 365.0 Introduction.

Pursuant to Chapter 25 of the Laws of 2020, the superintendent is required to create, in consultation with the director of the State Insurance Fund and the chair of the Workers' Compensation Board of the State, a risk adjustment pool to stabilize the market and protect insurers from disproportionate adverse risks associated with claims for disability benefits and family leave benefits paid pursuant to that Chapter.

The superintendent, in consultation with the director of the State Insurance Fund and the chair of the Workers' Compensation Board, has determined that claims for disability benefits and family leave benefits paid pursuant to Chapter 25 of the Laws of 2020 ("COVID-19 claims"), represent risk that was not factored into pricing policies covering disability or family leave benefits and thus present adverse risk disproportionate to the premium charged.

The superintendent also has determined that in calendar year 2020, certain insurers are anticipated to have COVID-19 claims experience relative to surplus such that immediate relief will be necessary to stabilize the impact of those claims.

Therefore, this Part establishes a mechanism by which 100 percent of COVID-19 claims paid will be recouped over a period of time to be determined by the superintendent pursuant to the provisions of this Part. This shall be accomplished by the pooling of a portion of the premium associated with providing family leave benefits, which will then be redistributed to insurers, including the State Insurance Fund, proportionately, based on the actual COVID-19 claims experience. Each insurer, including the State Insurance Fund, participating in the mechanism will be entitled to payment from the pool until it has received an amount equal to 100 percent of the actual COVID-19 claims paid.

Further, the mechanism will provide insurers that experience COVID-19 claims reaching a threshold level of greater than 20 percent of the company's surplus with the option to obtain immediate relief payments that shall be used solely for the purpose of paying COVID-19 claims. Such relief payments shall be subject to an interest charge that shall be paid in full by the insurer receiving the relief. Such interest charge shall not be reimbursed via the redistribution contemplated above.

Finally, the superintendent, in consultation with the director of the State Insurance Fund and the chair of the Workers' Compensation Board, has determined that contributions into the pool to fund the relief payments during plan year 2020 shall, to the extent possible, be provided by the State Insurance Fund. To the extent that the State Insurance Fund is unable to make contributions necessary to cover the entire amount needed in relief, other insurers participating in the disability benefits and family leave benefits insurance market may be called upon to contribute to the pool with the guarantee that such contributions shall be repaid in full with interest.

The following sections set forth the operation of this mechanism. To the extent consistent with this Part the terms defined in Part 363 of 11 NYCRR shall have the same meaning when used in this Part.

Section 365.1 COVID-19 Risk Adjustment Mechanism.

(a) There is hereby established a risk adjustment mechanism related to COVID-19 claims for disability benefits and family leave benefits paid pursuant to Chapter 25 of the Laws of 2020. Such mechanism shall be subject to the requirements of this Part.

(b) All insurers, including the State Insurance Fund, that issued policies covering disability benefits or family leave benefits for any portion of the calendar year 2020 are members of the mechanism.

(c) The mechanism shall be comprised of two components. First, it shall offer immediate relief payments from the COVID-19 risk adjustment pool necessary to ensure payment of COVID-19 claims for insurers experiencing disproportionate adverse risk due to a high volume of claims relative to the insurer's surplus. Second, it shall provide for the recoupment of 100 percent of COVID-19 claims paid through an adjustment to family leave benefits premiums in plan years 2021 and beyond.

(d) The superintendent may modify any of the requirements of this Part upon prior notice to any affected insurer within at least 24 hours, if the superintendent determines, in the superintendent's sole discretion, that such modification is necessary to prevent insurers from experiencing disproportionate losses due to high utilization due to claims for disability and family leave benefits paid pursuant to Chapter 25 of the Laws of 2020 or as necessary to prevent market disruption.

Section 365.2 Immediate relief payments from the COVID-19 Risk Adjustment Pool.

(a) Threshold to access immediate relief from the COVID-19 Risk Adjustment Pool.

(1) Any insurer with actual COVID-19 claims experience equal to or greater than 20 percent of the surplus of the insurer shall, pursuant to the requirements of this section, be eligible to apply for relief from the COVID-19 Risk Adjustment Pool.

(2) Relief from the COVID-19 Risk Adjustment Pool shall be granted only to the extent necessary to address losses suffered by the insurer as a result of COVID-19 claims. In no event shall relief be provided that exceeds the amount of the anticipated cost of COVID-19 claims as determined in the discretion of the superintendent.

(b) Content of the Application. Each written application for relief shall include statements affirmed as true under penalty of perjury by the chief executive officer as follows:

- (1) the amount of the relief payment being requested;
- (2) a statement that the insurer meets the threshold for relief pursuant to subdivision (a) of this section;
- (3) a statement how the insurer intends to meet its requirement to pay an interest charge;
- (4) a statement that relief funds will only be used to pay COVID-19 claims;
- (5) instructions on the preferred manner of receiving relief funds if approved; and

(6) any other information the superintendent may require based on the facts and circumstances of a particular application.

(c) The superintendent shall review the application for relief and shall render a decision thereon, in the superintendent's sole discretion, within 15 business days of the date the application is deemed complete.

(d) If an application is approved, the superintendent shall set forth the decision in writing to the applicant. The decision will include the following:

- (1) The approved amount of the relief;
- (2) The interest rate that shall apply to the repayment and the manner in which the interest charge shall be paid; and
- (3) Such conditions as the superintendent may determine necessary.

(e) In approving an amount of relief pursuant to this section, the superintendent shall consider COVID-19 claims which are anticipated to be paid by the insurer.

(f) If an application is denied, the superintendent shall set forth the reason for the denial. Denials are without prejudice for reapplication, however if three or more consecutive requests by an insurer have been denied, the superintendent may condition any reapplication for relief from that insurer on obtaining a report from an independent auditor certifying the need for relief.

(g) Approved relief shall be paid immediately from the COVID-19 Risk Adjustment Pool, subject to the availability of funds in the pool. If sufficient funds are not immediately available, the superintendent, in the superintendent's discretion, may cause a partial immediate payment to be made based on the availability of funds until funds are available in the COVID-19 Risk Adjustment Pool to pay the total approved relief outstanding.

(h) An insurer that has received relief pursuant to this section shall not be eligible for further relief unless its actual COVID-19 claims, since the date of its previous application, are greater than the total amount of relief previously received at the time of its next application. The superintendent may authorize an earlier application if the circumstances warrant more rapid need.

(i) Special reporting requirement for insurers that receive immediate relief.

(1) Any insurer that received relief pursuant to this section shall submit a report by April 1, 2021 setting forth how such funds were utilized. The superintendent may make any investigation or require any special report or data reporting necessary to determine the use of funds received from the COVID-19 Risk Adjustment Pool.

(2) To the extent any funds received pursuant to this section were not utilized or were utilized for any purpose other than to pay COVID-19 claims, the superintendent may order the insurer to immediately repay any such amount to the COVID-19 Risk Adjustment Pool.

(j) The superintendent may require any insurer who receives an immediate relief payment under this section to make interest payments directly to the insurer or insurers, including the State Insurance Fund, whose contributions under section 365.3 of this Part funded the relief payment.

Section 365.3 Funding the COVID-19 immediate relief payments.

(a) The superintendent may require any insurer subject to the COVID-19 Risk Adjustment Mechanism to make a payment into the COVID-19 Risk Adjustment Pool to cover immediate relief payments approved under section 365.2 of this Part.

(b) In exercising the power set forth in subdivision (a) of this section, the superintendent shall first seek to fund the immediate relief payments from the COVID-19 Risk Adjustment Pool through funds contributed by the State Insurance Fund.

(c) The superintendent may, if no further funds are available from the State Insurance Fund, require from all insurers that are members of the COVID-19 Risk Adjustment Mechanism, other than the State Insurance Fund, an amount not to exceed the total amount of relief approved, with each insurer paying an amount proportionate to the expected losses to be suffered by the insurer related to payment of COVID-19 claims, as determined by the superintendent.

Section 365.4 Recoupment of costs of COVID-19 claims.

(a) Notwithstanding any other provision of this Title, beginning plan year 2021 the superintendent may adjust premiums for family leave benefits in a manner necessary to enable the funding of the recoupment element of the COVID-19 Risk Adjustment Mechanism established by this Part.

(b) In exercising the power described in subsection (a) the superintendent shall:

(1)(i) determine the actual total cost of COVID-19 claims paid by members of the COVID-19 Risk Adjustment Mechanism;

(ii) determine, in an exercise of discretion, a number of years over which recoupment will occur, provided, however, that such period shall not be greater than three years unless the superintendent separately determines that a longer period is necessary to avoid market disruption for family leave benefits; and

(iii) determine the estimated number of lives in the market in the plan year for which an adjustment is to be made; and

(2) adjust the premium for family leave benefits in an amount equal to the cost determined in subparagraph (i) of paragraph (1) of this subdivision divided by the number of years determined under subparagraph (ii) and the number of lives determined under subparagraph (iii) of that paragraph, actuarially converted to a percentage premium adjustment consistent with the manner in which family leave benefits premiums are set.

(c) In the event that the total COVID-19 claims are not available to the department prior to the date on which it approves the premium rate for family leave benefits for plan year 2021, the superintendent may use an actuarially appropriate estimate of the total COVID-19 claims that will be paid by members of the COVID-19 Risk Adjustment Mechanism in place of the actual claims for the purposes of subdivision (b) of this section.

(d) The superintendent may modify the adjustment each year to reflect changes in the factors considered, provided, however, that the superintendent shall not adjust the period over which recoupment will be run following plan year 2021 unless the superintendent separately determines a longer period is necessary to avoid disruption in the market.

(e) Notwithstanding any other rule, any adjustment made pursuant to this section shall not be included in the calculation of any commission to be paid by any insurer.

Section 365.5 Collection and redistribution of funds from an adjustment.

(a) On or before May 1 of every year following a plan year in which an adjustment was made pursuant to section 365.4, each insurer participating in the family leave benefits market shall, pursuant to instructions issued by the department, deposit into the COVID-19 Risk Adjustment Pool an amount equal to the total amount of premium it collected that is attributable to the adjustment made under section 365.4.

(b) On or before June 1 of every year following a plan year in which an adjustment was made pursuant to section 365.4, the superintendent shall disburse the moneys in the COVID-19 Risk Adjustment Pool collected pursuant to subdivision (a), to those insurers who have made payments pursuant to subdivision (a), in proportion to the actual claims experience of those insurers related to COVID-19 claims. Provided, however, that:

(1) no disbursement shall be made to an insurer that would render the total payments made to that insurer from this mechanism greater than the amount it paid in COVID-19 claims;

(2) any disbursement that would be made to an insurer who obtained an immediate relief payment under section 365.2 shall be reduced proportionately based on the total amount of COVID-19 claims compared to the total relief payments received and the funds subject to such reduction shall instead:

(i) if the relief payment was funded entirely by contributions of the State Insurance Fund, be disbursed to the State Insurance Fund; or

(ii) if the relief payment was not funded entirely by contributions of the State Insurance Fund, be disbursed proportionately to each insurer that made a contribution that funded the relief payment.

(3) any disbursement that would be made to an insurer who obtained an immediate relief payment under section 365.2 that has failed to make interest payments as required shall be withheld and the superintendent may disburse the funds to cover the interest obligation of the insurer, provided that if the amount withheld is greater than the remaining interest obligation of the insurer, then excess funds shall be disbursed to all other insurers who have made payments pursuant to subdivision (a), in proportion to the actual claims experience of those insurers related to COVID-19 claims.

(c) Any funds remaining in the COVID-19 Risk Adjustment Pool that were collected pursuant to subdivision (a) of this section, after the application of the rules in subdivision (b) shall be distributed to cover any remaining interest charge owed pursuant to an immediate relief payment under section 365.2 by any member of the COVID-19 Risk Adjustment mechanism or if no such charge exists, shall be distributed in such other manner as the superintendent deems appropriate.

(d) For the purposes of this section the term *insurer* shall include the State Insurance Fund. The term may also include self-insured employers in the discretion of the superintendent, who shall render such a decision after reviewing the actual COVID-19 claims experience for the entire market.

(e)(1) No insurer that received an immediate relief payment under this Part shall be permitted to discontinue offering coverage for disability and family leave benefits before the entire amount received has been recouped pursuant to this section and the entire interest obligation has been repaid.

(2) Notwithstanding paragraph (1) of this subdivision, an insurer who has, outside of the recoupment process described in section 365.4 of this Part, paid to each insurer that funded the relief payment it received an amount equal to the relief payment and the total amount of interest required to be paid may request to discontinue offering coverage for disability and family leave benefits in accordance with subdivisions (l) and (m) of section 363.6, subject to such other requirements as may be applicable.

(3) In the event that an insurer exits the market for family leave benefits and the total amount of immediate relief payments it received or any interest obligation it has related to such payments has not been repaid such amounts shall be combined and treated as COVID-19 claims costs incurred by the insurer or insurers who funded the immediate relief payment. Any interest obligation of the insurer shall thereafter be paid by the exiting insurer into the COVID-19 Risk Adjustment Pool.

Section 365.6 COVID-19 Risk Adjustment Pool.

The superintendent shall establish, in the superintendent's sole custody, an account to be called the COVID-19 Risk Adjustment Pool, to receive transfers of funds from insurers subject to the risk adjustment mechanism established by this Part. The moneys so received and deposited in the COVID-19 Risk Adjustment Pool shall not be deemed State funds. The superintendent is authorized to make disbursements without an appropriation from the COVID-19 Risk Adjustment Pool for the purpose of remitting to insurer any moneys due them as a result of the risk adjustment mechanism established by this Part, and such disbursements shall be made pursuant to this Part.



Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

CERTIFICATION

I, Linda A. Lacewell, Superintendent of Financial Services, do hereby certify that the foregoing is new Part 365 to Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 217), entitled “Paid Family Leave COVID-19 Risk Adjustment Mechanism,” signed by me on August 25, 2020, pursuant to the authority granted by Chapter 25 of the Laws of 2020, 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 of the State Administrative Procedure Act, prior notice of the proposed rule was published in the New York State Register on June 17, 2020. No other publication or prior notice is required by statute.

Linda A. Lacewell
Superintendent of Financial Services

Dated: August 25, 2020