Assessment of Public Comment

During the public comment period, the Board received six written comments.

Overall/General Comments

Several of the comments supported the proposal to update the disability benefits regulations generally.

Several comments supported the proposed timelines for pregnancy-related disability, but recommended clarifying if and when medical certification is required for the four weeks prior to and six-to-eight weeks after birth. Since the regulations do not address the specifics of the disability benefits application process as a whole, no change to the regulation has been made in response to this comment. The Board will also update the disability benefit forms to reflect these updates.

Another comment requested that the proposal *not* include a presumption for four weeks prior to the child's estimated due date, citing an anticipated significant impact on the cost of the program and requiring a rate increase, as well as medical literature supporting physical activity in the weeks prior to childbirth. The Board has gotten feedback from multiple groups citing this as a problem and this regulation seeks to address that feedback. Because nothing in the proposal *requires* an employee to miss work and/or apply for disability benefits in the four weeks prior to the child's estimated due date, no change has been made in response to this comment.

Four of the comments requested a change be made to clarify the employee and employer's roles in submitting the application to the insurance carrier. The Board will update the forms and guidance to make it clear that it is the employee's duty to file the disability application, so no change has been made in response to these comments.

Several comments requested a change to add reasons to the list of examples of reasons it may not be reasonably possible for an employee to timely file for disability benefits. Because the reasons it may not be reasonably possible for an employee to timely file for disability benefits are so varied, fact-specific, and case dependent, the Board did not make a change in response to these comments, but will provide guidance on the website or other documents with frequently asked questions, including examples.

Three comments requested adding language stating that all disability and PFL materials be vital documents (including applications) that must be translated into commonly spoken languages. The Board has not made a change to the regulations in response to these comments, but is looking into translating these forms into commonly spoken languages.

One of the comments requested an effective date at least six months from the adoption of the proposal, and that the effective date be the January 1 of the year following amendment to fit in with the new policy year and allow carriers to update forms, etc. The Board agrees that some lead time is necessary before the proposal takes effect in order to update forms and allow

insurance carriers to update any systems required, etc. and the regulation's effective date has been set to January 1, 2024.

Section 355.4

Three comments supported the proposed amendment regarding domestic workers.

Another comment recommended adding "in the employer's home" to the proposed change in section 355.4(b) to avoid confusion about employees who work from home. The Board has not made a change to the regulation in response to this comment, because there could conceivably be a situation where the employee is working in a private home that is not also the employer's private home, but the Board will consider additional guidance for the website or FAQs.

Section 363.1

One comment requested several specific language changes. One was to add "at least" and "via vaginal delivery" and "is presumed to have" and "at least" to section 363.1(e). The Board has added "via vaginal delivery" to clarify this section.

The comment also requested that specific language be added to the definition of disability for stillbirth or loss of pregnancy in the second trimester: "An employee who experiences a stillbirth is presumed to have a disability caused by or in connection with a pregnancy for at least six weeks after vaginal delivery, or eight weeks after Cesarean section. Likewise, an employee who experiences a loss or termination of pregnancy in the second trimester is presumed to have a disability caused by or in connection with a pregnancy for at least two weeks." Two other comments requested language that allows entitlement to disability regardless of whether the pregnancy results in a live birth. No change has been made in response to this comment because we believe the definition is broad enough to accommodate the scenarios described.

The comment disagreed with making the disability benefits application process more aligned with the PFL process and opined that the involvement in the employer in the disability benefits process should not be introduced into the disability benefits application, as they do not think it works in the PFL process. Appeals by a carrier from denials based on insufficient information from the employer have frequently been received. The goal is to ensure that adequate information is collected to process the claim, and to make clear that incomplete employer information is not a valid basis for denial, so no change has been made in response to this comment.

One comment highlighted that the proposed amendment to section 363.1 did not include the statutory language that explicitly added mention of "incapacitation as a result of being an organ donor in a transplant operation." The Board has added this language to the proposal to align with the statutory language.

Section 363.13

The comment also recommended adding "except where the claim is incomplete due to the failure of the employer to timely and/or adequately complete the employer section" to section 363.13(d) if no changes were made as outlined above. Because section 363.13(g) of the proposal already states this, no changes have been made as a result of this comment.

The comment requested if no changes were made as outlined above "including untimely completion" be added to section 363.13(g). Because this language has also appeared in the PFL regulations since 2017, and that regulation has been understood to include "untimely" within "inadequate," and the Board has not been made aware of any issues in interpretation of this language, no change has been made in response to this comment.

Another comment requested the three business days be extended to five business days, or in the alternative, that carriers be allowed to require proof of income (i.e. paystubs). Because three business days has proven to be an adequate timeframe for completion of this information, no change has been made in response to this comment.

The comment requested the language regarding reasons a late application may be excused be changed from "such delay may be excused" to "shall be excused." Because the statute states "may be excused" and not "shall," no change has been made in response to this comment.

Three comments also requested language stating "in no circumstances shall the format prescribed by the chair for notice and proof of disability benefits request a social security number." Because a social security number is not required on the forms, no change has been made in response to this comment.

One comment also requested clarification between the difference between claim denial and claim rejection in section 363.13. The Board plans to create a new form for a notice of denial that only needs to be completed if the carrier does not issue the notice of rejection of a claim (currently DB-451) within 18 days of receipt of proof of the disability, to incentivize complete decisions on claims within 18 days as opposed to the 45 days in Workers' Compensation Law section 217. Because this will be a new form with instructions, etc. no change has been made to the proposal in response to this comment.

The comment pointed out a typographical error in section 363.13(c), which the Board has corrected.

The comment requested clarification requested clarification of the sentence beginning "Proof of a disability caused by or in connection with a pregnancy" in section 363.13(c). The Board has clarified the language in this sentence.

The comment requested specific changes be made to section 363.13(e) and (f) providing extra guidance for when a claim application has deficiencies. This language mirrors the PFL regulations and whether a claim has deficiencies may be extremely fact specific. To address any confusion and provide extra guidance, the Board does plan to add FAQs with examples, so no change to the regulation is needed.

One comment requested language be added to section 363.13(f) stating that payments made without prejudice while the dispute regarding coverage is resolved are subject to reimbursement by the carrier identified following the dispute regarding coverage. The Board has made a clarifying change to reflect this.

The comment also requested that section 363.13(f)(8) be amended to put "if available" at the end of the sentence. If the carrier has no evidence of a workers' compensation case – meaning no workers' compensation claim number, no employer name and date of accident or disablement, there would be no proper basis for the carrier to deny based on disability arising out of and in the course of employment in that situation, so no change has been made in response to this comment.

One comment supported the addition of section 363.13(i), but requested a deadline of seven days be added. No change has been made in response to this comment, as a seven day deadline is not always feasible.

This comment also had several requested changes to the paid family leave regulations (Part 380). This proposal only amended certain sections of the regulations dealing with disability benefits and does not address or propose changes to Part 380. Therefore, no changes have been made in response to those comments.

This comment also requested several "additional, non-regulatory actions the Board should take." The Board will consider the feedback provided, but no changes have been made to the proposal in response to those comments.

Section 363.15

Several of the comments highlighted a typographical error in section 363.15, and the Board has corrected this.

This comment also requested language be added to the proposal to explicitly clarify that complications of pregnancy or childbirth *do not* include "any complications experienced by the (un)born child(ren)." The Board has not made a change in response to this comment, because disability benefits are available only for an employee's own health condition.

The comment also requested that language be added to the proposal defining specific situations and examples where an employee would be entitled to disability and when they would not (for precautionary measures). Because the regulations serve as a framework and not a completely exhaustive guide, and because the situations that qualify for disability can be extremely fact-specific, no change has been made in response to this comment. The Board will provide additional guidance in the form of FAQs and/or website updates and communication efforts, as outlined throughout.

One comment requested that the "five business days" be changed to "18 days" in section 363.15, citing the amount of time the carrier has to pay or deny a claim for disability benefits. This five day requirement is not an approval or denial – it is just a requirement to provide the employee

information about what is missing from the application when an alternate method of submission is used, so no change has been made in response to this comment.

Changes made:

- Amended section 363.1 to reflect the statutory language in section 201(8).
- Added “via vaginal delivery” to clarify section 353.1(e)
- Corrected typographical error in section 363.13(c) (added “certification” to “medical”)
- Corrected typographical error in section 363.15 (reference to paid family leave corrected to disability benefits)
- Clarified last sentence of 363.13(c)
- Clarifying change to reflect that disability payments made without prejudice are subject to reimbursement by the carrier identified following a coverage dispute