

Delaware Paid Leave July Webinar Question & Answers

Questions on Employee Count

What qualifies as a small employer?

It depends on the context where the term is used. If you have one to nine employees, you are a small employer for Delaware's Paid Family and Medical Leave insurance program (PFML). If you have 10 to 24 employees, you are a small employer for PFML and are only required to provide parental leave. If you have fewer than 50 employees, you are also a small employer because, although you are required to provide PFML in Delaware, you are not required to comply with the federal Family and Medical Leave Act (FMLA).

Are owners of the company counted towards the employee count? Are family members (spouses/children) counted towards the employee count?

Employers can be employees, but only if they get paid by a W-2. If you get paid by some other means (for instance, percent of profit), then you do not get paid by a W-2 and are not considered an employee for purposes of this program. Those receiving a 1099 are also not considered employees.

If you have 10 employees, and two qualify for waivers and none are reclassified, must you pay in?

No. In this instance, your group would have only eight eligible employees, and you are excluded from the PFML insurance program until you reach 10 eligible employees. You do not have to register with Delaware LaborFirst (our online administrative system) and do not owe any PFML contributions. However, the employee count could change at any time based on your employees' terms of employment and their actual hours and wages, so you must be vigilant in tracking changes in your number of eligible employees and provide the mandated coverages 30 days after your group reaches 10 eligible employees. It might be easier to voluntarily enroll in the public plan (Delaware Paid Leave). This will enable you to preemptively provide some or all of the coverages that will probably be required of you in the future, so you won't have to worry about exactly when you need to do so.

Does "10 employees" mean 10 employees at a time? Or 10 total W-2s for the year — perhaps five employees at a time, but more than 10 W-2s for the year? Does the paid leave contribution need to be reported on the W-2?

It means 10 actively-at-work employees who meet the definition of the program — they work primarily (at least 60% of their time) in the State of Delaware and they are not on waivers.

Are h2a employees included in the Delaware Paid Leave program?

Every employee that gets a W-2 is part of the Delaware Paid Leave program. This includes employees on visas.

Are the threshold counts per FEIN? For instance, if a company has 27 employees in Delaware under three different FEINs, and each FEIN has fewer than 10 employees, is the employer exempt?

Yes, unless your group meets the FMLA definition of an “integrated employer” (there is a multi-step test laid out in 29 CFR 825.104(c)(2), which is part of the federal regulations for FMLA). Employers have to self-report as being (or not being) an integrated employer, but the state is required to verify that self-designation once the Division receives a complaint or inquiry.

Are Delaware union payroll companies required to participate in this program? Has a decision been made regarding employees that follow collective bargaining agreement contracts?

All employers that have 10 or more eligible employees and that are neither agencies of the federal government nor Seasonal Employers (as defined by the Act) are required to participate in the PFML insurance program. The Act says that CBAs need to coordinate their benefits with the program. Employers subject to CBAs are not exempt from the program.

Questions on Public vs. Private Plans

Are the premiums different between the public and private plans? How can I compare those costs?

The public plan costs 0.8% of an employee’s FICA wages (earnings inside the State of Delaware), which includes tips, bonuses, and commissions (among other things) for all lines of coverage. If you break out the costs, the medical line of coverage is 0.4% of an employee’s wages, parental leave is 0.32%, and qualified exigency and family caregiver is 0.08%.

Private plans do not have a maximum rate that can be charged to the employer. The only requirement in the Act is that, if an employee is required to contribute part of the cost of the plan, the private plan cannot charge them more than they would pay under the public plan.

Is there an advantage to choosing the state program vs. a third-party insurance program?

We’ll probably be cheaper because we require you to do more administrative work. While the insurance company will likely take over some of those administrative responsibilities, you will incur a fee. Also, if you have more than 50 employees (meaning that you have already been complying with FMLA) and you get a group PFML insurance program, that insurance program gets to decide if a PFML claim gets paid, while you decide what’s going to happen with the FMLA plan. If those two decisions are different for the same employee and same qualifying event, then the lawyers will probably get involved. Staying with the public plan and administering both the FMLA and PFML claims would eliminate that risk.

For a small employer with fewer than 25 employees, is there a benefit to using a privately funded insurance company/program vs. the state’s program?

Insurers will likely handle more of the administrative tasks in the program — but for a price. However, if you join the public plan, it does not matter how much your employees use the plan, the rates will not change, because we look at the claims patterns for the entire risk pool, which is all the enrolled employees in the entire state. A carrier, on the other hand, may use your claims experience to set and renew your rates.

If an employer has 50 or more employees and does not intend to get a private plan, must it register between September 1 and December 1, or does that apply only if an employer is opting in or seeking a private plan?

If you have 10 or more employees and you are planning on staying in the public plan, then you do not have to register with Delaware LaborFirst until just before you make your first quarterly hours and wage report and contribution submission by April 30, 2025. We encourage all employers who are using the state plan to register early, beginning September 1, 2024. It's best that you do not wait to register until April 30, because that day is going to be a "high stress" day for our computer system. You'll probably be better off registering before this deadline just to avoid any "system overload" on that day.

The regulations say that the private plan must make payments every two weeks. Are employers able to make payments more frequently — is that considered better than the default?

If you're asking about benefit payments for approved claims, the answer is the same as for most provisions of the Act: You can always do more than what is required; the Act only provides the minimum requirements. You're allowed and encouraged to go "above and beyond" to provide richer benefits than listed in the Act.

If an employer uses a private plan and pays the full premium on behalf of employees, can they deduct the cost from wages as a fringe benefit for prevailing wages?

I cannot comment on that issue; I suggest that you consult your attorney or tax advisor.

If an employer uses a private plan, will they be exempt from contributions to the state plan for 2025?

Yes. If an employer purchases a group PFML insurance policy approved by the Delaware Department of Insurance (DOI), or if they are approved by the Delaware Department of Labor (DOL) to self-insure, that employer does not have to pay contributions into the public plan.

Can employers choose to use a private plan during 2025?

Yes. Employers choosing to do this must complete the process in Delaware LaborFirst (our online administrative system) between September 1 and December 1, 2024.

TPAs and TPA Handshake

What will be the identifier for the TPAs in LaborFirst? Will this be an agent ID, TPA ID, FEIN, or their legal name?

It will start with their employer identification number followed by their legal name.

How do I find a list of approved TPAs or approved private providers if I choose to opt out?

Each TPA must register in Delaware LaborFirst. Those that have completed the registration process will be listed on a drop-down list of available TPAs. If you don't find your TPA in that list, please let them know that they must register in Delaware LaborFirst (the system will instantly update the drop-down list of TPAs as soon as they register).

If we are approved to opt out and privatize, do we need to complete any administrative requirements for the state, or would that be part of the contract with our private vendor?

Even if you use a private plan, you must submit a quarterly hours and wage report to the Division of Paid Leave through Delaware LaborFirst. We expect that insurance companies will submit that report on their clients' behalf. We also expect that if you hire a TPA to administer your approved self-insured program, your TPA will submit the report on your behalf. However, the employer is ultimately responsible, so make sure that your group insurance policy or ASO contract covers that task.

Can a private-plan carrier be part of the TPA handshake?

No, insurance carriers have a separate process. Carriers must apply with the Delaware DOI to have the PFML policies they wish to sell approved prior to the carrier and policy being listed on Delaware LaborFirst as a private plan option. You must upload your group PFML insurance policy, including the first page (the Declarations page), in order to affirm your relationship with the carrier.

We use a TPA to administer federal FMLA applications now. Would we still need a TPA, or can we trust the state plan to meet all the same guidelines for approval according to federal regulations?

Employers are still responsible for their duties and responsibilities under FMLA. If you currently have a TPA managing that process, they could (if they agree) handle your PFML plan, as well. They must register with Delaware LaborFirst to complete the "TPA Handshake" process to verify the relationship and to confirm the administrative tasks that you've agreed the TPA will perform in your name.

Are there licensing requirements for the TPAs? If so, what are they and where is the statute/regulation to reference?

We cannot provide any legal advice regarding licensing requirements for TPAs. Please consult your attorney. With respect to the PFML program, the relationship between an employer and their TPA is subject to the contract that they create between themselves. We're not a party to that process or relationship. We only want to make sure that the two of you (the employer and the TPA) agree that you have a contractual relationship for the TPA to provide certain administrative functions for the employer and that both of you agree to what those specific tasks are. We assume that you (the employer) have properly vetted the firm that you've hired to perform these functions that you are legally required to provide.

Questions on Plan Approvals

What if the private plan is submitted but not approved by the state by January 1, 2025, through no fault of the employer? How is the employer notified of approval/denial?

Employers are permitted to either use a DOI-approved insurance policy or self-insure if they meet the self-insured requirements. We expect all private insurance policies will be approved or denied by December 31. Prior to January 1, the employer will receive email correspondence indicating whether their application was approved or denied. If denied, the employer will be automatically enrolled in the public plan.

Do we have to wait until September 1 to find out who the approved private plan insurers are?

The Department of Insurance is currently reviewing the applications of insurers to sell PFML policies in the state. The DOI is the only entity with the jurisdiction to approve and deny these insurance policies. A handful of insurers are going through the filing process right now; it appears that there will be about 10 insurance carriers looking to be approved by the DOI to sell group PFML insurance policies in Delaware.

DOI will notify the Delaware Department of Labor once a company is approved, and these approved companies will be added to the drop-down list of DOI-approved insurance providers in Delaware LaborFirst. The drop-down list will not be accessible until the computer system is up and running. The Delaware DOI might provide that information prior to September 1, but your insurance carriers should know as well.

If an employer already offers paid leave, do they still need to participate?

Delaware employers were asked to participate in a grandfathering process to have an existing plan grandfathered in. The deadline for this, January 1, 2024, has passed. If you did not receive grandfathering approval, you will need to either use the state plan to provide PFML benefits or apply to either use a private plan through a commercial insurance carrier approved by the Delaware DOI or self-insure, if you meet the qualifications to do so.

Are not-for-profit organizations and religious organizations exempt?

Nonprofits, religious, and faith-based organizations are not exempt. The only categories of employers that are exempt under the Act are those with fewer than 10 employees, federal agencies, and “seasonal employers” (those that shut their doors for 30 or more days in a row). Every other type of employer is included in the PFML insurance program.

Delaware Employee Classifications

How is it handled if the employees have a variable rate of work in Delaware year to year?

It’s a percent per quarter. This is self-reported — you tell us whether a wage was earned in the State of Delaware or not.

If you have three locations, is it classified as the total number of employees you have at each center or the total number of employees for all locations?

It depends on your EIN. There are rules in the FMLA, 29 CFR 825.104(c)(2), about integrated employers who are treated as a single employer for the sake of this program.

Is it 10 Delaware employees or 10 employees overall?

It’s the eligible employees (not excluded by a waiver but including those that are reclassified) who work primarily in Delaware. If employees work outside of the state and do not work in the state for more than 40% of their hours per quarter, they are not included.

So, a remote worker that lives in and works from another state will not be covered under this plan because they are onsite for less than 60% of the time?

That depends.

- If the employee normally works five days per week and they work two days per week from their home in Pennsylvania, for example, that would be 40% of their time, so they would be included in the employee count.
- If they normally work only four days per week and they work two of those days from their home in Pennsylvania, then they would be working 50% of their time out of state, so they would not count towards the Delaware PFML insurance program (unless you both agree to reclassify them as a “Delaware employee”).
- If they work a five-day workweek and work three of those days from their home in Pennsylvania, they would be working 60% of their time in Pennsylvania, so they would not qualify for this program (unless you both agree to reclassify them as a “Delaware employee”).

For employees who drive regularly from state to state as part of their job, how do we quantify the number of hours worked in Delaware? Would we default to the state (“worked in”) where they pay taxes?

We only need the FICA taxes paid that were earned in the State of Delaware vs. outside of Delaware (we don’t need to know in which state the out-of-Delaware wages were earned). We follow the Delaware Division of Revenue’s rules for determining whether income is subject to Delaware state income taxes. However, this is self-reported by the employer, so we will accept what the employer or TPA submits until we have a complaint or an inquiry that causes us to investigate and validate the submitted information.

If we are a partial owner of another company, do we combine all our Delaware employees between the two companies, or should they be treated as individual companies? For FMLA our attorney recommended we honor both companies, even though one company is below the 50-employee mark.

Unless the two companies are considered “integrated employers” according to FMLA rules (29 CFR 825.104(c)(2)), you should report each company separately based on their separate EINs.

Questions on Short-Term Disability

If short- and long-term disability are offered, does medical leave have to be paid?

Yes, group short-term disability (STD) and long-term disability (LTD) are similar but not the same as PFML. However, PFML does overlap with group STD, so our benefits coordinate with STD payments. PFML is the secondary payer to any voluntary program that an employee might have that pays out income replacement benefits (including any STD plan the employee may participate in), unless specifically excluded from the policy. The first payer is generally the STD plan. PFML, as secondary payor, will supplement the group STD plan (unless the group STD plan pays the employee 100% of their wages, with no maximums, thereby making the employee whole).

If we have a current STD plan, is it worth maintaining if we also have paid FMLA?

Yes, there is still a role for group STD. However, there is a risk that what they cover will be reduced (and therefore the rates that you pay ought to be reduced, as well). Our program only pays for six weeks (30 days), while STD tends to pay out until day 120 to 180 (in coordination with LTD), so they cover what will become more like “mid-term” disabilities. Also, our program only pays out six weeks of benefits over a 24-month period, while STD provides their coverage maximums based on qualifying events (each time the employee has a new medical issue).

Questions on FMLA

Does this program run concurrently with FMLA and, if so, does that mean an employee can receive an additional six weeks unpaid after the initial paid leave that Delaware provides? So, the employee will be eligible for both 12 weeks of FMLA and 12 weeks of Delaware Paid Leave.

That would be “consecutive” (12 weeks of FMLA, then another 12 weeks of PFML). Our program runs “concurrently” with FMLA, meaning that our leave period overlaps with their leave period. For instance, if the employee uses six weeks of PFML medical leave (to take care themselves due to a serious illness or injury), they could take an additional six weeks of unpaid FMLA leave, if they wished.

Are employees eligible for this coverage if they have paid time off (sick time, PTO, etc.) during approved FMLA?

The Act requires each employer to decide whether they want to require that their employees must use most of their PTO before accessing PFML benefits. This is the same rule as in FMLA. By “most” of their PTO, we mean no more than 75% of what the employee has left in their “PTO bank” for that year at the time they make the claim. If you require your employees to use most of their PTO before they access PFML benefits, then you (their employer) will pay out their paid time off as normal (usually, at 100% of wages with no maximum for as many days as required). Then the PFML plan will start paying out at 80% of their average annual weekly wages (up to \$900 per week) for whatever weeks of leave they have left, if the employer requires PTO to be concurrent with PFML leave. However, this will use up most (but not all) of their PTO, so they’ll have less to use for paid sick or vacation days once they return from PFML leave.

Even if an employer does not “require” an employee to use most of their PTO leave before they access PFML benefits, they probably will want to do so voluntarily, because PTO pays out at 100% and PFML only replaces part of their income. So, they probably will use their PTO, if they have any to use.

Will Delaware Law reduce the eligibility for FMLA to 10 employees?

FMLA is a federal law. We’re not able to amend federal law. So, FMLA will stay at 50.

So, six weeks every 48 months for medical leave. FMLA is 12 weeks every 12 months, so employees would still be eligible for FMLA every year, just not paid leave, right?

It is six weeks every 24 months (two years) for medical leave. So, if they qualify, they will be able to take up to four times as much unpaid FMLA leave.

Is the 12 months rolling like FMLA or calendar 12 months?

“Application period” has four different definitions under FMLA rules. Under both programs, employers are required to choose which definition they would like to follow. We recommend that if you currently have FMLA, you stick with the same definition for PFML that you use for FMLA. If you do not have FMLA, we recommend that you choose the calendar year to make it easier for yourself and your employees. The automatic default setting when you come to register in Delaware LaborFirst will be calendar year, but you can change it to any one of the other three definitions.

Most of our employees do not use FMLA. For those that do not use FMLA/Paid Leave, will they be getting their money back at some point for paying into paid leave?

No. This is an insurance program — each person pays premiums (in our case, “contributions”) into the plan, and the plan pays out benefits if the person has a claim. If you do not have a claim, you do not get your premiums (“contributions”) back, as they were used to pay out other people’s claims.

Questions on Claims Approvals

Will there be a list of qualifying illnesses and injuries, or is it at the discretion of the employer?

This decision is not for the employer or Division of Paid Leave to make. Delaware LaborFirst will send a Certificate of Serious Health Condition to the patient’s health care provider. The health care provider will need to complete this certificate. We are following FMLA in this regard. Just like in FMLA, the health care provider will be the one making the decision as to whether a particular illness or injury fits the definitions (the same definitions of “serious health condition” that they’ve been using for the last 30+ years). Delaware Paid Leave is not going to doubt the provider’s decision, but the provider will put their medical license at risk if they are acting fraudulently — we will look for irregularities. It is also important to note that the health care provider will not be submitting the patient’s health information to employers and/or Delaware Paid Leave; we don’t ask for it and there is no place to upload it. This is to further protect employers and the Division of Paid Leave against HIPAA noncompliance.

How much will State of Delaware employees be required to pay for this program?

State of Delaware employees have been grandfathered for PFML because the state offered comparable programs before the law was signed by the governor. The state will administer those two programs as usual for the first five years of the program. After December 31, 2029, the state must either join the public plan, purchase a group PFML insurance policy, or be approved for a self-insured program. All state employees will receive family caregiver/QE coverage through the public plan from the start. We believe the state will be paying the full cost of the family caregiver/QE line of coverage contributions for 2025, but they have not decided what percent they’ll be paying in 2026 and beyond.

Will DOL provide forms for providers to complete and return to DOL or the employer?

Yes, DOL is creating all the forms and will make them available on the website (de.gov/paidleave) and on Delaware LaborFirst. However, health care providers will complete and submit the forms electronically, eliminating half-completed forms, unreadable handwriting, and forms getting “lost in the mail.”

Is there a minimum number of days an employee should be out prior to applying for medical leave? Can they apply for a five-day leave?

Medical leave and its benefits start on the same day as the qualifying event (the event that triggered the leave). If the qualifying event was a foreseeable event (such as an elective surgery), the employee is required to put their claim application in at least 30 days before the start of the leave. If the qualifying event was something sudden, like a heart attack, then they (or their designated assistant) should put their claim in as soon as administratively possible. Their health care provider will determine the duration of their leave.

Questions on the Types of Leave

How do we figure out which type of leave we are required to offer?

If you have one to nine employees, you are not required to participate in Delaware Paid Leave, but you may voluntarily enroll your group for some or all the coverages. If you have 10 to 24 employees, you are only required to provide employees with parental leave. If you have 25 or more employees, you are required to participate fully in Delaware Paid Leave and provide employees with all lines of paid leave coverage.

For parental leave, would the medical leave apply first, followed by the parental leave benefit?

Parental leave is for healthy children — giving parents time to bond with the child. If there's a medical complication before, during, and/or after a birth, the parents can take medical leave. They can take any remaining leave during parental leave.

Do qualified exigency and family caregiver leave run concurrently? What does “they always go together” mean?

The leave for each type of coverage (including family caregiver and qualified exigency) is taken separately according to its own schedule of benefits (each one gets a separate six weeks every 24 months). That is different from them being referred to as a combined “line of coverage,” which is based on how the coverage is provided. Each line of coverage can be provided by a different means. For instance, you can provide medical leave through an insurance company, self-insure for parental leave, and provide family caregiver/QE coverage through the public plan. “Qualified exigency” was not given a separate rate through the Act, so we combined it with family caregiver so that it would always be properly funded.

Will this plan cover domestic partners and/or same-sex spouses? If so, will domestic partners' children be qualifying for caregiver leave?

Yes, we follow state law for same-sex spouses and domestic partners.

Why does each type of leave have its own separate six-week entitlement in a 24-month period when the Delaware Code Online, Title 19, section 3703(a)(2), says, “The maximum aggregate number of weeks during which medical leave and family caregiving leave benefits are payable under § 3702(a)(2), (a)(3), and (a)(4) of this title in an application year is 6 weeks in any 24-month period.”?

The Act has another provision: a combined maximum of no more than 12 weeks in a 12-month period. Each type of coverage has its own specific number of weeks per benefit period. However, an employee cannot receive any more than 12 weeks of any type of leave per year.

Why does an employee who works for a small employer and who will never use parental leave due to age or health reasons have to pay?

This is a mandated coverage that does not have an age max or any other specific employee-level exclusion, except that they work “primarily” in the State of Delaware. If we did exclude certain employees, the rates would have to rise for the remaining eligible employees.

Is there a minimum amount of time an employee must use leave? For example, can they use one day a week for 20 weeks in a row? Or must they take leave in whole week amounts?

Just as with FMLA, employees can take approved leave in three ways: continuous, reduced schedule, or intermittent leave.

- Continuous is leaving on one day and returning several days (or weeks) later.
- Reduced schedule is when the health care provider says that the employee cannot work their normal schedule but can work a lesser schedule of fewer hours per day or days per week.
- Intermittent leave enables the employee to take their leave in an ad hoc manner as needs arise. However, unlike FMLA (which allows for employees to take intermittent leave in increments of an hour), PFML requires that employees take intermittent leave in increments of no less than a full day.

Delaware LaborFirst will track the number of days that are still available for employees to take their leave on any of these time frames. Reduced or intermittent medical and family caregiving leave must be medically necessary. Parental leave may only be taken on a reduced or intermittent schedule if permitted by the employer.

Did you say that if employees are not benefit-eligible for PFML (our nonprofit is 30 hours per week), it would still be required for anyone working 25 hours per week? So, would PFML be their only coverage?

Employees that work less than 25 hours per week must sign a waiver to be excluded from the program and from a contribution being paid on their behalf. All permanent employees, who work 60% or more of their hours per quarter in the State of Delaware, must participate in the program.

Our private plan ends this month, and we were not going to renew due to PFML. However, we have an employee who expects to have a baby in April of 2025. She seems to fall in the period before she can take advantage of this. Any insight? Also, will the percentage be like that of unemployment rate?

Unfortunately, benefits do not begin until January 1, 2026. However, an employee has 12 months from the birth of a child to take parental leave, so if your employee delays her leave until 2026, she may be able to receive benefits at that time if she is otherwise eligible. The unemployment rate is a different process and different coverage. However, unemployment will also be handled by Delaware LaborFirst (later in 2025).

We have fewer than 25 employees working in Delaware and are only required to offer parental leave. Is the rate still 0.8% of an employee's wage or is it reduced?

The rate for parental leave only is 0.32% of in-state FICA wages.

Questions on Contributions

If a company chooses to apply for a private plan to get approval, does that delay contributions? Or would contributions still be required to begin on January 1, 2025?

There are no contributions if you self-insure. If you purchase a group PFML insurance policy, the insurance carriers will issue you, starting on September 1, 2024, a policy that is effective on January 1, 2026 (which is when you'd start paying them your premiums). You will not pay any contributions to the state if you use an approved group PFML insurance policy.

Can the employer change their contribution each year? Is there a cap to the total contribution that one employee must make?

Yes, employers can change their contributions split each year on January 1. Employees will not be subject to PFML contributions once they hit the annual FICA maximum (which, for 2024, is set at \$168,400). Once their wages (combined from all states) reach the FICA max, no PFML contributions will have to be submitted on their behalf.

Do contributions start at hire or after the employee has reached the "FMLA" eligibility (1,250 hours, one year, etc.)?

It starts at the time an employee is hired. If we started at benefit eligibility, the rates would have to be set a lot higher. The assumption is that all employees will work 12 months out of the year and reach the 1,250 hours. However, if you know that you hired an employee to work only on a short-term basis (such as a student working for the summer) or just for a couple of shifts a week (less than 25 hours per week), then they would be able to sign a waiver and not participate in the program. However, the employer would still have to report their hours and wages on a quarterly basis.

If an employee has less than one year of employment and/or less than 1,250 hours, goes out on a medical or parental leave, and during that leave reaches the one-year requirement and hours, does the benefit begin at the time they reach the requirement? Or does the time out on leave not count towards the service date and hours accrual?

If they've worked for you for less than 12 months or have worked less than 1,250 hours of service in the most recent 12 months, then their claims application would not be approved, and no benefit would be paid out. The time an employee is on leave is not counted as hours of service.

Pay period begins December 29, 2024, and runs through January 11, 2025. Pay date is January 15, 2025. Since the pay date is in 2025, can we withhold employee portion for the entire pay period?

The Act says that you only apply the contribution rates to wages that were earned beginning January 1, 2025.

Is it up to 50% of the 80% of wages or 0.8% of wages?

This question conflates two different percentages.

- The "80% of wages" refers to the benefit calculation. If the employee is approved for PFML leave, they will receive 80% of their average weekly wages from the last 12 months, up to a maximum of \$900 per week. The state will pay out those benefits from the PFML fund that is created through your quarterly contributions.
- The "0.8% of wages" refers to how the contributions are calculated. For every quarter that the employer employs the employee, they will take each of their eligible employees' in-state FICA wages and multiply it by .008 to get the dollar amount of the PFML contributions. As an example, for \$50K of annual wages, the 0.8% rate comes out to \$400 per year. This comes out to \$15.38 per "every-other-week" paycheck period (\$400 divided by 26). If you split the \$15.38 50/50 with your employees, that would be about \$7.70 per paycheck for you and the employee.

What is the wage base or maximum wage used to calculate the 0.8%? For example, Delaware unemployment maximum wage base is \$10,500.

The wage base for PFML is FICA, the same wage base that is used to calculate Social Security taxes. This means that the wage base includes compensation types such as tips, bonuses, and commissions. It also means that there is a cap on earnings above a set amount (in 2024, the cap is set at \$168,400). However, it is important to note that the State of Delaware can only require that contributions be paid on wages that are earned in the territory of our state; we are not able to mandate contributions on extra-territorial wages.

Questions on Providing Additional Coverage

If an employer has 10 to 24 employees and wants to provide additional coverage, can the additional coverage be for just those employees who wish to receive the additional coverage, or would it need to be for all employees?

You may provide additional coverage, but if you do so through the public plan (Delaware Paid Leave), then you must provide it to all your employees. However, if you provide the additional coverages through a group PFML insurance program, your carrier might allow you to provide non-mandated lines of coverage on an individually voluntary basis. Technically, such individually selectable, voluntary coverages are not in compliance with the Act, so if you set it up that way and then you rise above 25 employees, then you will be required to provide all the lines of coverage to all your eligible employees at that point. So, it is probably easier (even through a private plan) to provide your employees with a fully compliant plan, even though you do not have to at that moment.

If I'm an employer with 10 to 24 employees, and I opt in to additional lines of coverage beyond what is required, am I responsible for 100% of the extra contribution?

We are not able to provide legal or tax advice. Employers who want to offer non-mandated PFML benefits to their employees should consult their attorney and tax professional regarding who is responsible for the cost of the “additional” contributions.

Questions on Taxing

Are the employee contributions pre-tax or post-tax? Are they tax-deductible for employers? Are the deductions pre-tax?

We have not received guidance on the taxing of Delaware Paid Leave from the federal or state government tax authorities. Please consult your tax professional.

Are the taxable wages for Delaware Paid Leave the same as Social Security taxable wages?

Yes, Delaware's PFML insurance program uses FICA as its wage base.

Will all employees be continually taxed, regardless of eligibility? I'm thinking of the part-time employees that will not always be eligible to use the benefit.

Please refer to the waiver process.

Questions on Waivers

Do I need to collect and remit the tax for employees that work only 20 hours per week?

If they don't sign a waiver, then yes. If you both sign a waiver, then no one's expected to pay PFML contributions on their behalf.

Are there any waivers/exemptions for union members?

No, union workers are not exempt from this program. The Act only requires that their benefits be coordinated with PFML benefits.

Can you explain the waiver process? The employer notifies the employee of the option, but the employee must do everything else, correct?

Delaware LaborFirst manages this process for the employer. The employer fills out their part of the form on the Delaware LaborFirst portal and electronically signs it. Delaware LaborFirst creates the waiver form and sends it to the employee by email through a third-party app, SDocs (the employee does not need to download anything). The employee then signs the form electronically, and the system sends it back to the employer (and the TPA, if there is one). Then the system automatically marks the employee as “on waivers” and stops accumulating contributions on their wages.

When you mention that a waiver can be signed if the employer is not benefit-eligible, are you speaking solely about working the 1,250 hours within 12 months?

Waivers are available for employee who will never meet the 12-month and/or 1,250-hour requirements to be benefit-eligible.

If an employee knows they are retiring before 2026, can they sign a waiver? If employers are only required to offer coverage for parental leave and an employee knows they are not having any more kids, adopting, or fostering, can they sign a waiver?

Technically, retirement in the next 12 months does not qualify for a waiver, but this is also a self-reported program that is driven by complaints. The Act does not allow for employees to individually “opt out” or decline a line of coverage. There is not an exclusion for those “over a certain age.” Plus, there are far too many examples of people who have had to legally take on their grandchildren or nieces/nephews or friend’s kids for some reason. No one can know for sure that they will never have to take care of children sometime in the future.

Employee Reclassification

What is the process to reclassify an employee?

The process is very much like the process for putting employees on waivers (or taking them off waivers). The employer finds the form online on Delaware LaborFirst, fills out their required information and electronically signs it. The system then sends the form to the employee by email, the employee signs it, and the system returns it to Delaware LaborFirst, where the system automatically updates the employee’s status.

How does reclassification work for remote employees who live in Maryland or New Jersey and are eligible for paid leave in their home state? Can they reclassify into the Delaware PFML insurance program, or should they stay with their home state? For example, Maryland requires all Maryland employees to contribute to state paid leave regardless of eligibility. So, could these remote employees have both? And if so, who is primary?

If the employee lives in a state where they might be eligible for their home state's PFML insurance program, they should probably not reclassify into the Delaware PFML insurance program.

Employer Paid Leave Programs

How does this program work with employers who have generous leave time? For example, an employer requires employees to use their paid leave before being unpaid for FMLA. If an employee has accrued 1,600 hours in their "sick bank," how does this help them?

This is a mandatory program for eligible employees. You might want to revisit your existing PTO programs to better coordinate with this new statewide program.

Will we pay this on gross wages whether they are for hours worked? Example: vacation, holiday, sick pay, etc.?

The Act specifies that the contributions are calculated as a percent of FICA wages (the wages that are used to calculate your employees' Social Security taxes). However, as a Delaware program (rather than a federal program), we can only require contributions on wages that are earned in the State of Delaware, so it's really a percent of in-state FICA wages.

Do employees have to use all their paid time off before they are allowed to go out on this leave?

The Act requires each employer to decide whether or not they want to require that their employees must use most of their PTO before accessing PFML benefits. This is the same rule as in FMLA. By "most of their PTO," we mean no more than 75% of what the employee has left in their "PTO bank" for that year at the time the claim is made. If the employer requires their employees to use most of their PTO before they access PFML benefits, then the employer will pay out their paid time off as normal (usually, at 100% of wages with no maximum for as many days as required). Then the PFML plan will start paying out at 80% of their average annual weekly wages up to \$900 per week. This will use up most (but not all) of their PTO, so they'll have less to use for paid sick or vacation days once they return from PFML leave.

However, just because their employer does not "require" them to use most of their PTO leave before they access PFML benefits, they probably will want to do so voluntarily, because PTO pays out at 100% and PFML only replaces part of their income. So, they probably will use their PTO, if they have any to use.

For State of Delaware employees, how much will they be required to pay for this program?

I actually do not know. That decision is made outside of the Division of Paid Leave. However, by law, employers are not allowed to require their employees to pay more than half of the cost of the program.

Part-Time Employees

Is a private school that is closed to students/teachers for 60 days during the summer considered "seasonal" even if they still have tuition payments coming through all year?

No. Schools are not exempt from the PFML insurance program.

If an employee has not worked for me for a year, are premiums still required for them?

No. If an employee does not work for you, then they did not earn any wages from you. So, 0.8% of \$0.00 in wages is \$0.00 in PFML contributions.

What if you have a part-time employee that may work less than the 1,250 required hours for your business, but they work a second part-time job somewhere else, and the combined hours worked is more than 1,250. Is either employer required to collect the required payment of the tax?

Each employer only pays on the wages the employee earns from them. The 1,250 hours minimum in the most recent 12 months is also calculated separately for each employer. Our online administrative system, Delaware LaborFirst, will track all this for you.

If an employee worked for an employer for 12 months, reached the 1,250 hours and was eligible, but then changed employers, do they have to wait the year again to be eligible?

Yes, they do have to wait. The 12 months requirement applies to a specific employer. The second an employee switches to another employer, they must start again at day one with the new employer. However, if they return to work for the first employer within seven years, they will get credit for that prior time worked with that first employer. This is a requirement from FMLA that we are following. Delaware LaborFirst will begin tracking that seven-year gap starting with their hours from January 1, 2025, going forward.

Employee-Specific Questions

Will State of Delaware employees have to pay up to 50% of the 0.8%?

This is currently being decided, but not by the Division of Paid Leave.

What happens if nobody uses the plan for the year?

Then they will be grateful that neither they nor their loved ones had a serious illness or injury. The claims experience from the other 13 states that have had similar programs to this (New Jersey and Rhode Island have used something like PFML since the late 1940s) tells us that on average, the program experiences six claims per hundred employees per year, which is a higher utilization than Short-Term Disability.

Are employees charged quarterly?

Employers must submit their contributions quarterly. If the employer requires their employees to contribute up to half of the cost of the program, then they must do it as a payroll deduction (so, whatever that paycheck cycle might be — weekly, biweekly, bimonthly, etc.).

Can an employer still collect up to 50% back from employees based upon the cost of a private plan (for instance, if the private plan includes administrative fees for the employer)?

The Act requires that if an employer uses a private plan (self-insured or insured), they cannot require their employees to contribute more than they would pay under the public plan.

“Paid at 80% up to \$900.” Can employees use leave to make up the difference?

Yes, if permitted by their employer to do so. In addition, employers are free to offer more coverage than the Act requires. If the employer wishes to provide richer benefits (even up to 100% wage replacement to make their employees whole while they are on leave) than is available under the public plan (which only provides the minimums required by the Act), then they can provide a self-insured “top-up” plan to provide those additional benefits from their own funds. If the employer wishes to do so, we will be able to provide them ASO services through Delaware LaborFirst for free (they will be responsible only for the cost of the additional benefits).

If we are requiring the employee to pay 50%, can the employee opt out?

No, these are mandated benefits that the employee cannot individually decline.

Did you say higher earners don’t have to pay into Delaware PFML, or just that anything over Social Security max is excluded?

You pay into the program until you hit that day (FICA max), then you stop paying.

Do I take 0.04% of my current annual salary to get a good estimate of how much will be taken from my salary each year?

If your employer requires you to pay up to half of the cost of the program, then yes, that would be a good estimate. We are building a contribution and benefit calculator that will reside on our webpage (DE.gov/PaidLeave) to help employees and employers make these kinds of estimates.

Helpful Resources

Will a presentation be made available for employers to share information with employees?

Yes, we are creating an employer toolkit that includes information that employers can pass on to their employees to help them understand the program. It will be available on our division webpage.

If this is through a portal, will Delaware be switching to an unemployment claim portal like Maryland? Will the division provide templates for employee notification at time of hire?

At some point later in 2025, the Division of Unemployment Insurance will be joining Delaware LaborFirst for UI assessments, and there will be one combined quarterly hours and wage for both UI and PFML. By the middle of 2026, UI will begin managing claims through the same online administrative system.

If an employer purchases a private plan, will the online system still be available to them?

Starting on September 1, Delaware LaborFirst will be where you will notify us that you have purchased a DOI-approved group insurance program. After that, if you have private insurance, the insurer will be sending us the required hours and wage report for you and all their other PFML policyholders.

Delaware LaborFirst will also be where (starting on September 1) you can apply to self-insure your employees for some or all the PFML line(s) of coverage. It is also where you will name your TPA and send in your quarterly hours and wage report. It is also where you can sign up to use Delaware LaborFirst to administer your DOL-approved self-insured program for no fee (completely for free).

Who will be running the portal and the benefit payments? Is that the state or a third party?

Delaware LaborFirst is owned by the State of Delaware, but we have contracted out the development, implementation, and maintenance (and enhancements) of the system to Infosys — one of the world’s largest technology consulting companies.

Do you have resources available in Spanish?

Those are being developed and will be released as part of the implementation of the program.

Will the portal help us track/flag if someone has maxed out of a leave in each 12-month period, or of a medical leave with six weeks every two years?

Yes, Delaware LaborFirst will track all aspects of plan administration for you to ensure that you are in compliance with the Act and its regulations.

Will the employer and TPA resources be available prior to the date the portal goes live?

We have been working with the TPAs, especially the payroll service companies, for months. In weekly meetings, we’ve been co-designing the quarterly hours and wage reports and the process to submit contributions. If your TPA would like to participate in these weekly meetings, please contact us at PFML@Delaware.gov. We will also be posting the resulting technical details of these reporting and submission processes on our division webpage.

What are the steps required to register your business with LaborFirst?

The process is a little different based upon the number of employees you have and how you want to provide PFML benefits to your employees (public plan vs. insurance policy vs. self-insured). We will be posting a set of step-by-step instructions for how to complete the process and what to expect on our division webpage.

When will the specifications for the quarterly PFML wage file be published on the Delaware PFML website?

We are co-developing these requirements with a group of payroll service companies and some of the state’s largest employers. We will post them to our division webpage as soon as they are available.

Will there be a public list of approved private plans available somewhere (i.e., outside of the drop-down menu in the sign-up portal) so that employers can know ahead of time who is approved?

The Delaware Department of Insurance is managing the process for filing to offer a new group PFML insurance policy. They will inform the carriers who apply whether their filing was approved.

Is there an annual rate to use the system?

No, Delaware LaborFirst is free to use, even if you use it to administer your DOL-approved self-insured plan or your self-funded “top-up” plan.

Is this where the hours, wages, and payments will be sent as well?

The quarterly hours and wage report will be submitted through Delaware LaborFirst.

Will reclassification and declassification forms be provided on the state portal?

Yes, every form will be available through Delaware LaborFirst.

Since this is a mandate from the state, will you be providing something for us employers give to our employees about this, or is it up to us?

The notices that employers are required to provide their employees will be available on the Division’s website and in Delaware LaborFirst. The Notice of Employees’ Rights that must be given to all employees 30 days prior to the start of the program (by December 1, 2024), when an employee is first hired, or when the group crosses a threshold number to acquire new coverages, is already available on the Division’s webpage (DE.gov/PaidLeave).