



DELAWARE  
**Paid Leave**

Family and Medical Leave Insurance Program

## **Employers & Third Party Administrators (“TPAs”)**

# **Guide to Delaware Paid Leave**

## **Paid Family Medical Leave (“PFML”) Insurance Program**

*Delaware Paid Leave is an employer mandate that requires employers to provide their workers with income-replacement benefits while they are on approved, job-protected (but unpaid) federal Family Medical Leave Act (“FMLA”) leave. It serves as an insurance plan wrapped around FMLA. PFML Leave is served concurrently with FMLA and PFML generally follows the rules for FMLA (with a few exceptions based on the realities of offering a monetary benefit).*

*This document is an attempt to simplify the rules and regulations for Delaware Paid Leave, using plain language to explain the Act and the regulations and to provide examples. As such, we are trying to stick to the “generic case” and the particular facts around your case may be different. Please contact us at (302) 761-8375 or [PFML@Delaware.gov](mailto:PFML@Delaware.gov) to ask us questions directly.*

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## **Eligibility**

**Eligibility** should be a simple issue of “who is in the plan” but in insurance, nothing is ever simple. Navigating eligibility criteria can sometimes feel like wading through murky waters, but understanding these distinctions is crucial for ensuring everyone gets the coverage they need and that contributions are paid for those for whom payment is required.

- **Employers** – This refers to the “company” or the “group” that is subject to the program.
- **Employees** – These are the individuals covered by the plan, often referred to as “workers” or “covered individuals”. Employee eligibility is further broken down into two forms: *program eligibility and benefits eligibility.*

## **Employer Eligibility**

Let’s start by determining whether or not the employer is required to participate in the Paid Family Medical Leave (“PFML”) insurance program, also known as “Delaware Paid Leave”. There are four main categories of employers that are **excluded** from the PFML insurance program:

- **Federal Agencies** – the federal government defines their employees’ benefits, not the states. This category includes the armed forces. The following groups are excluded for similar reasons:
  - **Railroads** (Amtrak, etc.) – Their workers’ employee benefits are covered by a separate law, the National Railway Labor Act.
  - **Tribal Governments** – As sovereign nations, tribes have the right to make their own rules for their own government employees.
- **Seasonal Businesses** – if a business shuts down for at least 30 consecutive days, they are excluded from the PFML insurance program.

- However, even during shutdowns, businesses often have some employees continuing essential tasks like facility maintenance or back-office duties such as accounting and human resources. The key is really whether or not the business stops doing “commerce” (buying and selling stuff) to the public or other businesses during the shutdown.
- If you are a Seasonal Business, it is not just that you do not have to pay into the program while you are shutdown. You are fully excluded from the plan. If you are a Seasonal Business, throughout the year, you will not have to submit contributions for your employees, and your employees will not be able to get PFML benefits.
- Schools (public, private, charter, or religious) are not considered to be seasonal businesses under this program. Schools must provide Paid Family Medical Leave benefits to their employees.
- **Non-Delaware Based Business** – Around two-thirds of the Fortune 500 companies are incorporated in the State of Delaware, yet many of them do not actually have any employees working in Delaware. If an employer does not have any employees physically working in the State of Delaware, that employer does not have to participate in the Delaware Paid Leave program.
  - It is not necessarily about “office locations” or “workplaces” where employees are assigned, but rather where the workers are physically located when they are actually doing their work.
  - If an employer has telecommuters who live in the State of Delaware, then they might be subject to the program. It depends on how many employees the employer has who physically work in the State of Delaware. We’ll discuss that in the section on Employee Eligibility below.

- **Employers with Less Than 10 Eligible Employees** – in the next section we will discuss which employees are considered eligible under the PFML insurance program. However, if you have fewer than 10 such employees, you are not required to participate in the program. That means that you do not need to register with or get in touch with us in any way. However, if you wish to voluntarily enroll in the program, you are free to do so through the Delaware LaborFirst portal starting September 1<sup>st</sup>. Once you do rise to 10 or more employees, then you will need to comply with the Act and join Delaware Paid Leave.

Besides those four exclusions, every other type of employer in the state is required to participate in the Delaware Paid Leave program. This includes:

- Delaware State Government
- State Affiliated Quasi-Governmental Organizations (Public/Private partnerships)
- County, City, and Municipal Governments
- Religious Organizations & Religiously Affiliated Organizations
- Schools (Public, Private, Charter, Higher Ed, Pre-Schools, Day Care, After Care)
- Nonprofits
- Small Businesses
- Large Businesses
- Mid-Sized Businesses
- And probably your business

While most employers are included in the program, not all of them are required to fully participate.

We will discuss this in more detail when we talk about the different *Lines of PFML Coverage*.

Depending on how many eligible employees you have (your “Employee Count”), you might not need to pay the full contribution amount, or you might not have to pay anything at all.

- **Grandfathered:** the Act that created the PFML insurance program (the Health Delaware Families Act) included a provision that “rewarded” employers who had already been

providing their employees with coverage similar to that required by the program. The 13 other jurisdictions with PFML insurance programs essentially declared all previous similar programs “null & void” with their new program the only way going forward. In 2023, Delaware opened a Grandfathering Portal to approve or decline employers’ applications to extend (sometimes referred to as “Grandfathering”) their “comparable” PFML benefits. The Act permitted them to apply to continue some or all of their PFML-comparable benefits “as is” for the first five years of the program. That Portal closed on December 31, 2023.

- If an employer’s application for Grandfathering was approved through the Portal for a specific line of PFML coverage (a concept that is defined below), they are excluded from the Delaware Paid Leave program until December 31, 2029. This means that they do not have to submit contributions for that/those lines of coverage and their employees will submit claims through their employer’s previous process. Just over 120 employers were approved to be Grandfathered before the Portal closed, only a small portion of the approximately 6,000 employers that are subject to this mandate.
  - Employers who were approved for Grandfathering can decide to not use the exclusion that they were granted. They can, instead, chose to join the PFML insurance program.
    - Every year on January 1<sup>st</sup> a Grandfathered employer may decide to exit their Grandfathered status and join the PFML insurance plan. If they do so, they will default into the public plan, but they will have the ability to apply to use a new private plan through Delaware LaborFirst each year starting on September 1<sup>st</sup> until December 1<sup>st</sup>.

- Employers who were not approved for Grandfathering on particular lines of coverage are defaulted into the public plan. However, they may apply to use a private plan as an alternative.
- On January 1, 2030, Grandfathering will expire, and the employer will be defaulted into the public plan (or they may apply at that time to use a private plan as an alternative) for any lines of PFML coverage that were previously Grandfathered.

### **Employee Eligibility**

As discussed above, employee eligibility has two components: *program eligibility* and *benefit eligibility*. **Program eligibility** is the process of determining whether or not contributions need to be paid on behalf of an employee. Generally speaking, **all employees are included** in this program. Every employee of the company should be automatically enrolled in the plan. However, it's important to note that not all workers are considered "employees" for the purposes of Delaware Paid Leave.

- **Exceptions to Employee Status** – Certain types of state government employees (for example, “Seasonal / Casual” workers) are not covered by this plan. Independent contractors who receive a 1099 are also excluded (be aware, however, that the Department of Labor and other state and federal agencies are focusing their enforcement activities on whether or not employers have been “misclassifying” their workers).
- **Business Owners** – Owners can be “employees” under this plan, but they must be paid a regular salary (not as a percentage of profits or some other formula) and earn a W-2.
- **Hours Worked Outside of Delaware** – Employees must perform at least 60% of their work each quarter while physically located within the boundaries of the State of Delaware (we’ll talk about *Reclassifications* later).

- **Multi-State Work** – Workers who are “based” out of an office in Delaware but are sent to projects (whether large construction jobs or on service calls to fix the plumbing) in a neighboring state need to have their hours tracked for when they are located inside vs. outside of Delaware. Believe it or not, this is the same rule that applies to state income tax, so you probably are doing this already. Delaware Paid Leave follows the regulations of Delaware’s Division of Revenue to determine if a wage was earned in or out of Delaware (the process for determining whether or not a particular wage is subject to state income taxes).
- **Telecommuters** – if an employee works from home and their home is not in the State of Delaware, those hours do not count as “Delaware hours”.
  - If an employee of a Delaware-based company works from home in Pennsylvania two days in a five-day work week, then they are still working three-fifths of their time (60%) in the State of Delaware, so contributions still need to be paid on their behalf.
  - However, if their normal work week is only four days per week, those 2 days working from home would count as 50% of their time, so they would not be considered “employees” under the Delaware Paid Leave program.
  - Conversely, if they regularly maintain a 5-day work week but shift to a consistent 3 (or more) days-per-week work from home schedule from their home in Pennsylvania, then at least three-fifths of their hours are performed out of state, so they would not be considered “employees” under this plan.
- **Delaware LaborFirst**, our online administrative system, will track this requirement (and many others) for you. While we will not collect in-state vs. out-of-state hours, we will approximate this split through the in-state vs. out-of-state FICA wages that



you will report through your quarterly Hour & Wage reports. If that split between in- & out-of-state wages falls below 60/40, we'll notify you through the notes section of your Quarterly Contribution Estimate report.

- While some quarterly variations in the 60% requirement are permissible, significant periods where an employee works less than 60% of their time in Delaware may result in that particular employee being removed from the program by the Division. However, for short durations (less than a few quarters) where an employee works only slightly below the 60% threshold, employers can maintain an employee's eligibility in the program by continuing to remit contributions in their name.
- We consider such minor variations from quarter to quarter to be akin to “clerical errors” and therefore acceptable by the Division.
- For state income tax purposes, the State of Delaware already requires employers to track their employees' hours according to where the hours were performed. The determination of where employees perform their work is based on the rules of the Delaware Division of Revenue. Just like withholding for payroll taxes, the in-state vs. out-of-state hours will be self-reported by the employer. Both Delaware State Income Taxes and in-state FICA Wages are “self-reported” data points.
- If employees work from home in a state with its own PFML insurance program (e.g., New Jersey, Maryland, D.C., or one of the nine other states that have their own PFML program), we will only focus on Delaware-based hours and wages for both contribution and benefit calculations. Each state with its own PFML program has their own guidelines for addressing employees who work in multiple jurisdictions. Unlike Unemployment Insurance where federal guidelines are incorporated into

state laws, there are no federal guidelines for PFML programs. Our program has made the conscious choice to create rules that seek to minimize the extra-territorial impact of the Delaware Paid Leave program.

The intent of this program is that any worker who receives a W-2 and who works in Delaware (at least 60% of their time), will be required to participate in the program. This describes the situation for the vast majority of employees who are being considered for coverage.

The general rule is that contributions need to be submitted for each employee regardless of the number of hours they work per week or the number of months they have been employed by that employer. Unless a *Waiver* has been signed by both the employer and the employee (explained starting on Page 12 below), contributions will be due for the employee from the day they are hired.

### **Employee Benefit Eligibility**

**Benefits eligibility** is about the determination of whether or not an employee can be paid benefits at a particular moment through the program. The way that the program was designed, this means that an employee can be required to have contributions paid on their behalf even though they may not be eligible to receive benefits from the program. To determine if an employee is benefit eligible, they must first pass the definition of a program eligible employee by applying the program eligibility rules, which means that the worker is:

- Working for an employer that is required to be in the plan (not a federal, railroad, or tribal government worker or a worker at a seasonal business) and working 60% or more of their time in Delaware;
- Not a state governmental Seasonal/Casual employee; and
- Not an independent contractor (they must receive a W-2).

If an employee is program eligible, their employer must submit contributions in their name.

However, even though contributions are being paid in for them, the employee must then meet two additional conditions before they can receive benefits under this program:

1. They must have had worked for their Delaware-based employer for **at least 12 months**:

- Once this requirement is met with a particular employer, the precondition remains satisfied until the employee leaves that employer.
- If the employee moves to a different Delaware-based employer, they must **start a new 12-month period**.
- Should the employee leave their Delaware-based employer to an employer outside of Delaware, they have to follow that state's PFML rules. Depending on the rules of their new employer's state, that might mean that employee may not be eligible for any PFML coverage.
  - If an employee returns to their previous Delaware-based employer and the gap in their employment is *less than seven years*, they get credit for the time they previously worked for that employer. In other words, the 12 months does not need to be consecutive, it can be accumulated over seven years.
  - However, if the gap between their first period of employment and their return to that employer has lasted longer than seven years, the employee must wait a full 12 months before becoming eligible for benefits again.
    - The seven-year gap in employment rule is part of the federal FMLA program and we retained it in order to be consistent with that program for those employers who must comply with both.
- If an employer fires an employee just before they complete their 12-month period and that firing can be related back to the employee exercising their rights under the

law, it may be considered job discrimination, which is a violation under the Healthy Delaware Families Act. If a complaint is filed asserting that job discrimination has taken place, the Division is required to investigate. If wrong doing is established, the Act provides for the imposition of penalties by the Department of Labor. The Division of Paid Leave and the Department of Labor may refer the case to the Delaware and U.S. Department of Justice to pursue further. Such measures ensure that employers adhere to the provisions of the Act and prevent discriminatory practices against employees.

- Our online administrative system, **Delaware LaborFirst**, will track this 12 month requirement for you. However, LaborFirst can only “look back” to January 1, 2025, when the Division began tracking employees’ hours and wages for Delaware Paid Leave.

2. Employees must have served at least **1,250 hours in the most recent 12 months** for their employer.

- This 1,250-hours requirement comes from the federal FMLA program and, just like that program, it applies to hours of service (which does not include sick time or vacation)
- Unlike the tracking of wages, the hours of service (since we are trying to mirror FMLA) is accumulated for time physically worked in any state (not just Delaware).
- This is roughly equal to a 25-hour per week work schedule for a year (if one includes 2 weeks of annual vacation/sick time). However, the actual number of hours per week will vary based on the company’s paid time off policies & the employee’s actual use of their allowed paid time off.

- The 1,250-hour requirement follows the employee for their entire stay with their employer. Unlike the 12-month requirement, it is not “one-and-done”. The look-back period for this requirement follows them for as long as they are employed by their employer.
- The 1,250-hour requirement applies per employer. Hours of service do not accumulate across multiple employers. If an employee switches from one Delaware-based employer to another, their hours restart at zero.
- If an employee fails to meet the 1,250-hours requirement, they will continue paying contributions (unless they sign a Waiver), but they won't be eligible for benefits until their hours exceed the 1,250 threshold again.
- As with the 12-month requirement, terminating an employee just before they reach the 1,250-hour threshold may be considered job discrimination if the termination was in retaliation for the employee exercising their rights under the Act. Complaints regarding such practices will trigger an investigation by the Division. Violating this provision may result in penalties imposed by the Act, with possible involvement of the Delaware and U.S. Department of Justice.
- **Delaware LaborFirst** will track this requirement for you based on the information gathered from your quarterly Hours & Wage reports.

When we get to the **Claims Adjudication** section (which will be added a few months prior to the January 1, 2026 start of claims applications), we will discuss the process for approving or denying claims applications based, in part, on these two conditions.

### **Waivers**

Employers and employees are probably thinking:

*“It doesn’t seem fair that employers must pay contributions into the program for an employee who is not eligible for benefits.”*

And they are correct. However, that is why there are Waivers.

When a new employee is hired, there should be a discussion between the employer and the employee about the terms of their employment. If an employee and their employer agree to a work schedule that anticipates that the employee will be either:

- **A short-term employee** - who will not be working with that company for more than a year, perhaps just for the summer or just for a for two-month long project; and/or
- **A very part-time employee** - working less than 25 hours per week, perhaps just a couple of shifts over each weekend or a few hours after their other job.

In either case, it would be clear that the intention by both parties (the employer and the employee) is that their employment relationship was never expected to reach either the 12 month or 1,250-hour minimum requirements for PFML coverage.

Of course, we are talking here about intent, which is notoriously difficult to determine. However, most employers have this discussion before they hire a new employee, which will provide some clarity about their intent, even if their intent evolves over time or if one of those parties is less than forthcoming. As for the Division, we will accept a Waiver freely signed by both parties as a reliable indication of your intent.

Employers will be able input the information necessary to create the *Waiver or Removal of Waiver* forms through Delaware LaborFirst. The employer will provide the necessary information with their and the employee’s data and the system will create the document. Delaware LaborFirst will email the Waiver (or Removal of Wavier) form to the email address provided by the employer for the employee. The employee will electronically sign the form through a third-party software program

(SDocs), and it will be remitted back to the Division, where it will automatically update LaborFirst's database. The system will store a copy in the employer's document archive, which will be accessible from both the Employer and Employee Portals. If the employee is under 18, they must get their parent or legal guardian to sign their Waiver.

Once a Waiver form has been submitted for an employee, it **ends** the need for that employee to have contributions submitted on their behalf. The form will be effective no later than on the date that it is submitted, however:

- For new hires, Waiver forms will become effective retroactively to the earlier of their date of hire or the start of the Quarter in which the Waiver was received.
- For existing employees, their Waiver form will be effective on the first date of the calendar week after which the form was received in the system. This will mean that an employee may spend part of a Quarter on the plan and part of the Quarter on Waivers, since PFML contributions are calculated on a weekly basis.

While an employee is on Waivers, the employer must continue to submit that employee's hours and wages as part of the employer's quarterly report. This requirement ensures that **Delaware LaborFirst** can track their information and **notify the employer** (via the Quarterly Contribution Estimate) if any employee is nearing the 12 month and/or the 1,250-hours threshold. The system will even account for the seven-year gap allowance in the counting of the 12-month period (except that the system cannot go back beyond the earliest data in the system, starting from January 1, 2025).

Because employer/employee relationships can change over time, part-time employees become full-timers and seasonal workers can become permanent, Waivers can easily be unintentionally exceeded. Delaware LaborFirst's monitoring and notification mechanisms will help employers

stay informed and compliant with the program's requirements. As long as employers voluntarily remove their employees from Waivers before they exceed those thresholds, they will not have to pay interest or penalties on the “due contributions”.

### **Removal of Waivers**

Employer should attempt to proactively remove their employees from Waivers, especially when they are facing two common circumstances:

- If the employer receives a warning from the Division that the employee is nearing either the 12-month or the 1,250-hours maximum; or
- There has been a substantial change in the employer/employee relationship, such as, the employee is now working on a full-time basis or changed their schedule to take on more hours per week than was originally agreed upon.

When an employee is removed from Waivers, employers will need to pay the “back contributions” which are the contributions that were “earned” (those that the employee should have paid) while the employee was on Waivers. The online administrative system will calculate the amount that is due. ***As long as the employer removes the employees from Waivers before the employee exceeds the 12-month or 1,250-hour thresholds, the employer will not face any penalties or interest on “due but unpaid” contributions*** if they are repaid in a timely manner. If an employee moves to full-time status or gains more hours, it is a benefit to the economy of Delaware and ought to be celebrated.

Because every new short-term and/or very part-time hire has the possibility of becoming more permanent, it should be a “best practice” for employers to place at least part of the contributions that have been waived into a “reserve”, in case the Waiver is removed or revoked.



As with nearly all other types of payroll deductions, employers can only deduct for PFML contributions that were “earned” in the current pay period. Employers are not allowed to deduct for amounts that ought to have been deducted in previous pay periods. Therefore, the Removal of Waiver form only requires the employer’s approval. However, the employer is required to notify the employee that they are now eligible for PFML benefits under the plan (the Notice of Employee Rights form can be found on the Division’s website).

Contributions for the employee will begin at the start of the next calendar week after the Removal of Waiver form is received, even if it occurs in the middle of a Quarter. **Delaware LaborFirst** will track the due contributions for you.

### **Revocation of Waivers**

When an employee is within 25% of reaching the thresholds for benefit eligibility, their employer will be notified through their *Quarterly Contribution Estimate*. A notice will be provided on the next *Calculation* after the employer’s *Hour & Wage Report* indicates that the employee on Waivers has actually worked 9 or more months and/or if they have served more than 1,000 hours in the past 12 months for the employer.

The Division will not automatically revoke the employee's Waiver when these levels are exceeded, as the hours might be due to temporary or seasonal fluctuation in the employee’s normal schedule and/or the employee’s service with the employer might still end before the 12-month point is reached. However, once the next quarterly Hours & Wage report indicates that these thresholds for benefit eligibility have been crossed, the Division will automatically and unilaterally remove the employee from Waivers (the system will notify both the employer and employee that they have been returned to the program).

Upon revocation of an employee's Waiver by the Division, the “past due” contributions will be calculated by **Delaware LaborFirst** from the earlier of 12 months before the Waiver was signed or the date of the original Waiver (as calculated by the online administrative system). Simple interest will be applied to the back premium at a rate of 1.5%, per the normal procedures of the Delaware Department of Finance. Penalties will be posted to the account as specified in the Act.

If the Division suspects a pattern of overuse of Waivers by an employer, either by the Division’s own means or by a complaint, the Division will investigate. If the investigation confirms this suspicion, penalties may be imposed, and the matter may be referred to the Delaware Department of Justice.

### **Reclassification**

Reclassification is available for employees who do not perform at least 60% of their hours within the borders of the State of Delaware, a situation that would normally exclude that employee from this PFML mandate. However, if these employees are connected to Delaware in a manner that makes them feel part of the Delaware team and are considered to be a “Delaware team member” by the employer, they can be reclassified to count as Delaware employees for Delaware Paid Leave. It's important to note that reclassification is not intended to provide coverage for someone who has no connection to Delaware but still wishes to be part of this program. Every reclassified employee must maintain a connection to the State of Delaware, either by an intent to return to the state or by being a telecommuting member of a Delaware-based team.

To qualify under this option, the employee must either be:

- An enrolled employee who switched or is about to switch to a work from home schedule that puts them over the 60% requirement; or

- A new employee who works 100% from home in a state other than Delaware but is part of a larger Delaware-based team; or
- An enrolled employee who is placed on a temporary out-of-state assignment.

To complete the Reclassification process, the employer and employee must sign a Reclassification form that follows the format of the Waiver process. Through both parties signing the Reclassification agreeing to participate in the Delaware Paid Leave program even though their participation is not mandated. Once an employee has been reclassified, their “wage base” (the amount that is multiplied by the applicable contribution rate) will be their combined in-state and out-of-state FICA wages.

### **Declassification**

Reclassification is a voluntary process, requiring mutual agreement between both the employer and the employee. Declassification is a process whereby the employer terminates the reclassification of the employee. The employer completes a Declassification form, which is accessible through our Division’s website, [DE.gov/PaidLeave](https://de.gov/PaidLeave), or on our online administrative system, ***Delaware LaborFirst***. The form only needs be signed by either the employer for the declassification to take effect and for the employee to be removed from the Delaware Paid Leave program.

Once signed and submitted, the declassification will become effective on the first day of the calendar week after which the Declassification form was received. Once the declassification takes effect, contributions will no longer need to be submitted in the employee's name, and the employee will no longer be eligible for benefits under the program. The Declassification form removes the employee from the Delaware Paid Leave program.

## **Notices**

The Act requires employers to provide notices to their employees whenever any of the following issues might arise:

- **Gain or Lose a Line of Coverage** - The employer must provide notice to employees within 30 days of when they are about to lose or gain a line of coverage. So, if an employer's Employee Count rises to a threshold number resulting in the group gaining line(s) of PFML coverage, they must receive notice within 30 days of when the additional employee is added to the Employee Count. If an employer's Employee Count falls below and stays below the threshold number for 12 continuous months, then the employer has to notify their employees that they may be losing line(s) of PFML coverage (if they do not rise above the threshold number within the 30 days before the date the notice was sent).
- **Employer/Employee Contribution Split** – The Act allows employers to require their employees to bear the cost of up to half of the cost of the program through payroll deductions. The Division therefore assumes that most employers will be splitting the cost 50/50 with their employees (although, that might not be the case). If a particular employer asks their employees to contribute less than 50% of the cost of the program, then the Act requires them to provide notice of the reduction from 50/50.
- **Notice of Employee Rights** – We have placed a “soft copy” of this notice on our Division's webpage ([DE.gov/PaidLeave](https://DE.gov/PaidLeave)) for employers to distribute to their employees. This notice must be provided to all eligible employees to inform them about the PFML insurance program at least 30 days prior to January 1, 2025. This notice is especially important if you are requiring your employees to contribute towards the cost of providing coverage. This notice should also be given to new employees when they are first hired, when an employee

requests a leave, or when the employer believes that the employee might qualify for PFML leave due to an event in their life which might trigger one of the four types of coverage.

- **Notice of Coordination of Benefits** – Employers must also provide notice about how the PFML insurance program coordinates with other income-replacement benefits (Paid Time Off, Short Term & Long Term Disability, etc.) an employer offers and how these benefits may affect an employee’s claim. If your group is in the Public Plan or if you use our online administrative system, Delaware LaborFirst, to provide ASO services for your self-insured plan, the system will include this notice as part of the claims application process. If you self-administer or hire a TPA as your administrator for your self-insured program or if you purchase a Group PFML insurance policy, the employer is responsible for sending out this notice when an employee applies for benefits.

All of these notices will be found on the Division’s webpage for employers to download. You are allowed to send these notices by electronic means, such as email, and they can be delivered to either the employee’s work or personal email address. Employers should retain copies of the sent emails for their files, in case there are any disputes over whether or not the notices were sent in a timely manner.

### **PFML Coverages & Private Plans**

Paid Family Medical Leave is not a single benefit, it’s actually a bundle of connected coverages.

The PFML insurance program follows the structure of (and, wherever possible, the rules for) the federal FMLA program, which has been in existence for over 30 years.

FMLA is mandatory for employers with 50 or more employees and provides up to 12 weeks of job-protected but unpaid Leave for the following four types of coverage.

- **Parental Leave** – for the parents to bond with their healthy child (whether from adoption, fostering, or natural birth) in the first year of the child’s life.
- **Medical Leave** – for employees who are seriously ill or injured.
- **Family Caregiver Leave** – for employees to take time off from work to care for a seriously ill or injured family member (child, spouse, or parent).
- **Qualified Exigency** – for an employee to use to address issues that may arise associated with a family member’s deployment overseas on military duty.

Under FMLA, the 12 weeks of leave are either approved or denied by the employer, who must adhere to all applicable federal rules. The employer will rely on a healthcare provider to certify that the patient (whether that patient is the employee or an eligible family member) has a serious health condition that qualifies them for coverage, and the healthcare provider will also determine the duration of the employee’s approved leave. Delaware Paid Leave follows the same basic outline as the process for FMLA.

It is important to note that not all employers are required to provide their employees with all the types of PFML coverage. The employer must calculate their Employee Count using the following formula (**Delaware LaborFirst** will also track the Employee Count based on the quarterly Hours & Wage reports that are submitted for your group):

- Begin with all employees, regardless of their weekly hours or tenure, if they work at least 60% of their hours per quarter in the State of Delaware; then...
- Subtract out all employees currently on Waivers; then...
- Add in any employee that has been Reclassified.

Your Employee Count may change from day to day as new employees are hired, existing ones become full-time, or others leave. The information provided to the state on your quarterly Hours &

Wage reports are reported in arrears, so it will not be able to track these daily changes to your company's Employee Count.

The required coverages provided by each employer depends on their Employee Count.

<b>Employee Count</b>	<b>Required Coverages</b>
Fewer than 10 Employees	The employer is not required to provide any PFML coverage but may voluntarily enroll in some or all of the lines of PFML coverage.
Between 10 and 24 Employees	Only required to provide Parental Leave, but can voluntarily enroll in the Medical and/or Family Caregiver/QE lines of PFML coverage.
25 or more Employees	Employers must provide their employees with all the PFML coverages

Both 10 and 25 are considered "Threshold Numbers" for employer's Employee Count that mark the line between gaining and losing a type of coverage. As the Employee Count rises above a Threshold Number, the group gains additional types of coverage. As it falls below these Threshold Numbers, the group loses types of coverage.

The general rule is that coverages are **easy to gain and difficult to lose**. However, these changes in coverage are not immediate. New coverages are gained 30 days after the group rises above a Threshold Number. This delay allows employers time to notify their employees about their types of leave and any potential increase in contributions to the plan. However, a group does not lose coverage(s) until they stay below a Threshold Number for 13 consecutive months (12 months to lose the coverage & 30 more days to provide notice to the employees). Please note that the 30 day notice period, when translated into the weekly periods tracked by **Delaware LaborFirst**, equates to 5 weeks.

The federal FMLA allows workers to take their leave in three different ways:

- **Consecutively** – The employee leaves on a certain date and returns on a predetermined day;
- **Reduced Schedule** – The employee can not work their normal work schedule but can work for a shorter period per day for a certain number of weeks; or
- **Intermittent** – The employee can leave work for as little as one hour at a time to visit a healthcare professional or some other approved reason for themselves or a close family member.

FMLA was established more than three decades ago and has become familiar to the employers who are subject to it. An entire industry of consultants has also arisen to help employers comply with their responsibilities and duties under the FMLA program. The rules and regulations around FMLA have been thoroughly vetted, the body of precedents set by the Courts and various enforcement agencies have been well established, and there is plenty of information out there on the web (even TikTok videos) on how to manage FMLA.

However, there are some idiosyncrasies that exist in FMLA's rules that we must comply with because of our decision to follow FMLA. For instance, while spouses qualify as eligible patients for whom employees can take time off to provide care to through Family Caregiver Leave under FMLA, siblings are not. Additionally, while one can take time off to care for parents, the same does not apply to parent in-laws. Delaware's PFML program largely aligns with FMLA, with the main differences arising due to issues from the different needs (such as, anti-fraud measures) that are necessary to administer a cash benefit program but not concerns in an unpaid program. For instance, while FMLA permits increments of intermittent leave as small as one hour, it would be administratively burdensome to provide paid leave in such short increments, so intermittent leave under PMFL must be taken in periods of at least one day.



Due to the cost of providing income-replacement for employees on approved leave, the benefits under Delaware's PFML program are more limited in duration than under the FMLA program. The two programs, PFML and FMLA, run concurrently, meaning that they both begin at the same time. However, in many instances, the employee may be eligible for additional weeks of unpaid, but job protected FMLA leave even after their PFML benefits have been exhausted. This may also be true if an employee faces two medical qualifying events within 24 months. If an employee has, say, a heart attack one year and takes 6 weeks of Medical Leave to recover from that condition, then they are break their leg and need surgery a year later, they would have already used up all their PFML Medical Leave for that 24 month period and they would not be eligible for approved PFML leave for their broken leg. However, FMLA only looks at 12-month periods ("application periods"), so the employee may be eligible for FMLA (unpaid, but job protected leave) if they work for an employer with 50 or more employees.

The PFML schedule of benefits are:

<b>Parental Leave</b>		
Benefit Percent		80%
Weekly Maximum Benefit		\$900
Maximum Duration		12 weeks in a 12-month period
<b>Medical Leave</b>		
Benefit Percent		80%
Weekly Maximum Benefit		\$900
Maximum Duration		6 weeks in a 24-month period
<b>Family Caregiving Leave</b>		
Benefit Percent		80%
Weekly Maximum Benefit		\$900
Maximum Duration		6 weeks in a 24-month period
<b>Qualified Exigency Leave</b>		
Benefit Percent		80%
Weekly Maximum Benefit		\$900
Maximum Duration		6 weeks in a 24-month period
<b>Combined Maximum Duration</b>		
For any type of Leave, no more than 12 weeks in a 12-month period		

At first glance, it may appear that an employee covered by PFML could be entitled to up to 30 weeks each year. However, the Combined Annual Maximum provision limits employees so that they **cannot receive any more than 12 weeks of any type of leave in a year.**

While FMLA offers four types of leave, Delaware's PFML program only provided for three rate categories. This is why we talk about having only three lines of coverages (versus four "types" of coverage), because Family Caregiver Leave and Qualified Exigency Leave must always be taken together. The Act created the separate contribution rates for each line of coverage to let employers provide their employees with their mandated PFML coverages through three different risk-transfer methods:

- **Public Plan ("Delaware Paid Leave")** – This is the default option; it is essentially an insurance company established by the State through the Division of Paid Leave that pays both benefits and plan expenses through the contributions paid by the employers.
- **Group Insurance Policy** – Employers may purchase a Department of Insurance ("DOI")-approved insurance policy for some or all of the PFML coverages required by the Act as an alternative to participating in the Public Plan.
  - For employers with 50 or more employees (those who are required to comply with FMLA) who are considering providing their mandated PFML through a Group Insurance Policy, please be aware that issues may arise if the insurance company denies an employee's PFML claim while you (the employer) approves the underlying FMLA request (or vice versa).

- **Self-Insured Plan** – If approved by the Division, employers may provide some or all of their mandated PFML coverages through an employer-administered and funded plan (although, employers may hire Third Party Administrators under an Administrative Services Only contract to manage their plan). To receive Division approval for a self-insured plan, employers must:
  - Have more than 100 employees or be deemed by the Division to have the administrative capacity to manage a compliant PFML insurance program;
  - Provide benefits equal to or more than the Act’s minimum requirements;
  - Demonstrate financial capacity to provide for 6 maximum benefit cost (\$900 per week for 12 weeks, or \$10,800) claims per 100 employees per year;
  - Maintain a separate bank account devoted to only paying PFML claims that is continuously funded with half the amount above; and
  - Secure an annually renewed surety bond in accordance with the program’s regulations (State, County, and Municipal government employers do not need to provide a surety bond).

Under the terms of the Healthy Delaware Families Act, group insurance policies and self-insured plans are both defined as **Private Plans**. Employers have the flexibility to provide mandated PFML coverages by either consolidating all coverages through one method of risk transfer or through a combination of the public plan, a group insurance policy, or a self-insured plan.

### **Employee Classes**

Employee Classes provide employers with a means to categorize their employees based on legitimate criteria such as work location, job title, or employment status. These classes should not be defined in a discriminatory manner (race or ethnicity based, by religion, age, or by any other

legally protected class), ensuring fairness and compliance with legal standards. The Division reviews the employer-provided definitions of Employee Classes to prevent illegal discrimination.

Employers can use Employee Classes to differentiate between employees to track contributions costs or plan for staffing requirements. They can be used to provide for different employee-employer contribution splits or to provide one class of employees with only the benefit plan required by the Act while providing another class of employees with a top-up plan (for instance, staff get the basic public plan, associates get a top-up plan to 100% but with a weekly maximum of \$2,000, while partners get an unlimited top-up plan).

When using Employee Classes, employers must designate which Class each of their employees is in on the quarterly Hour and Wage reports. This will allow for accurate tracking and administration of benefits within the organization.

### **Top-Up and Administrative Services Only (ASO) Plans**

Offering top-up plans allows employers to enhance the benefits provided by the state's PFML insurance program. Prior to the implementation of Delaware Paid Leave, some employers offered more generous benefits to their employees, including a few that provided benefits as high as 100% income replacement with no weekly maximum. While there was concern that these rich benefits would no longer be allowed, you can be assured that the Delaware Paid Leave program accommodates such arrangements. Employers can set up their plans so that Delaware Paid Leave provides insured benefits meeting minimum Act requirements, while administering richer benefits for some or all of their employees through self-funded plans that provide additional benefits. Employers can access **Delaware LaborFirst** to administer their top-up plan *at no extra cost*.

Providing these ASO services through our online administrative system at no additional cost to the employers will encourage more employers to stay in the public plan; thereby enhancing compliance, and increasing the efficiency of random audits that the Division of Paid Leave is required to perform under the Act. Delaware employers will already be using our system to determine eligibility and adjudicate the basic benefits of the public plan, so it will only be a marginal additional deployment of system resources to provide the amount and the duration of the top-up benefit. We will do the calculations and provide the top-up benefit details, making sure that it is all compliant, while the employer bears the cost of providing the additional benefits. Starting on September 1, 2024, employers will be offered the option to check a box to indicate that they wish to use the **Delaware LaborFirst** system to administer their top-up plan. While this step isn't mandatory, it ensures you're notified for the next required action (setting up your plan design) before claims applications start on January 1, 2026.

If you are approved to use a self-insured plan, you will also be able to check a box to administer your plan through **Delaware LaborFirst**. This option is provided at no additional cost and will streamline the process without additional expenses to the employer who would otherwise have to build or buy a complaint PFML administrative system. If an employer wishes, our system will handle enrollment and advise them how much and for how long they should pay benefits to qualified employees. Employers can provide richer benefits than required under the Act, they can match the benefit design of the public plan, or they can provide different plans to different Employee Classes. Our system won't manage claims funds or make benefit payments, but we will ensure that your mandated benefits are properly adjudicated and calculated based on the schedule of benefits that you design through Delaware LaborFirst. This approach streamlines access to information and benefits for employees, enhancing overall efficiency.

If employers wish to fully self-insure or if they wish to provide their employees with a self-funded top-up benefit plan (regardless of whether or not they administer those plans through Delaware LaborFirst), the Division will provide compliant plan document templates that they can tailor to fit their group’s individual circumstances. Templates for self-insured and top-up plan documents will be available on the Division’s website.

For more details on the Private Plan and Small Employer Voluntary Enrollment process, please refer to our Division website's FAQ section ([DE.gov/PaidLeave](https://de.gov/PaidLeave)) and the specially designed online Portal, Delaware LaborFirst, which will be open from September 1<sup>st</sup> to December 1, 2024.

### **Contribution Rates & Calculations**

Employers are responsible for 100% of the contributions under the plan, but the Act allows the employer to require their employees to pay up to (but no more than) half of their contributions. The employer is responsible for the proper administration of such a cost-sharing requirement and the Contribution Split (the percent paid by the employer vs. the employee’s percent) can vary by Employee Class. Payroll provider services and other third party administrators (TPAs) are available to help employers with these issues, although usually on a fee or commission basis.

For employers in the public plan, the contribution rates are calculated according to the following table:

Parental Leave	0.32%
Medical Leave	0.40%
Family Caregiver/QE Leave	0.08%
<b>Combined</b>	<b>0.8%</b>

As a certain insurance company (that apparently hires emus as sales reps) says, “you only pay for the coverages you need”. So, if you provide Parental Leave through the public plan, but you provide

the other coverages through a group insurance policy, you only have to pay 0.4% of your program eligible employees' in-state FICA wages. Only if you provide all the required coverages through the public plan will you need to submit the combined rate of 0.8% of your employees' in-state FICA wages. Delaware LaborFirst will help you calculate your group's quarterly PFML contributions.

Bundling all coverages with the public plan would amount to \$400 in annual contributions for each \$50k of in-state FICA wages, which amounts to approximately \$7.70 per pay period (if you pay your employees 26 times per year on a biweekly basis and you have a 50/50 split with your employees).

- If you purchase a private plan through a DOI-approved insurance carrier, the carrier is allowed by the Act to charge the employer any rate they agree upon, but the employees can not be charged any more than they would have to pay if they were covered by the Public Plan.
- Providing mandated PFML coverages through a self-insured private plan means employees may not pay more than under the public plan, while you (the employer) cover all plan expenses and claims, ensuring legal compliance, including submission of the mandated quarterly Hours & Wage reports.

Whether your employees are on the public plan or are covered through a private plan, the Division requires submission of your employee's hour and wage information. This information can be provided on an individual employee-by-employee basis or through an automated, bulk upload that we call the Hour & Wage report. In addition to basic demographic and plan enrollment information about your employees, the plan will require you to provide total hours of service and in-state vs. out-of-state FICA wages for each calendar quarter. This information is required in order to

complete the Division's mandatory routine and random audits of private plans and will be used to help you track your employees on Waiver's continued eligibility for that provision.

### **Quarterly Hour & Wage report**

Retroactive adds, drops, and changes to the employee's hour and wage information can be inputted through an individual amendment to the hour and wage report. For new hires (adds), employers must provide date of hire, employee classification, and any hour and wage information from prior quarters. For employees who have left the employer (drops), the employer only needs to provide the date of separation. When these individual updates are made, the system will automatically update all Employee Counts, required or lost coverages, and will re-calculate the required contributions, allocated to the correct weeks and quarters.

Whether you supply the required hour and wage information through bulk upload or through individual employee-by-employee inputs, once the system is updated with your employees' latest hour and wage information, Delaware LaborFirst will produce a new Quarterly Contribution Estimate. For each employee, the system multiplies their wage basis (in-state FICA wages for most workers or combined in-state and out-of-state FICA wages for reclassified employees) by each contribution rate for each enrolled coverage line. The system then consolidates each of the separate lines of coverage for each week and then combine the lines for the total for PFML coverages for each week in the quarter, and then for the entire quarter.

On the Due Date for each quarter, the system automatically generates a .pdf document that captures the Quarterly Contribution Estimate as it stands at that moment. That .pdf document is stored in the employer's document archive to stand as a baseline for each Due Date's amount due. The system will continue to automatically update the earned contributions as an employer provides retroactive adds, drops, & changes to its employee census, so this archived "invoice"



stands as a snapshot of the group's contributions due 30 days after the end of each quarter. If retroactive adds, drops, or changes result in past due premiums, interest and penalties may be applied as required by Delaware's standard collections rules.

Contributions follow the same schedule as Unemployment Insurance, with payments due thirty days after the end of a quarter. A six-day Grace Period is provided before accounts begin accumulating simple interest and/or penalties according to the State's standard past due collections rules.

All contributions will be processed through a separate system administered by JP Morgan but reconciled in **Delaware LaborFirst**. The Delaware Department of Labor audits the Division's books, followed by the Delaware Department of Finance. Additionally, audits may be conducted by the Office of the State Auditor and/or external auditors as needed. The PFML Fund will be maintained and managed by the Office of the State Treasurer and the account will be administered according to the State's standard investment processes and procedures. All interest earned by the PFML Fund will be forwarded to the State's General Fund for the payment of non-PFML expenses.