



DELAWARE Paid Leave

Family and Medical Leave Insurance Program

September 13, 2023

Questions and Answers from the Public Comment Period Regarding the PFML Final Regulations

General Responses to the Public’s Comments About the Delaware Paid Leave program

On May 1, 2023, the Department of Labor Division of Paid Leave (the “Division”) published the [first release of proposed regulations](#) for the Paid Family Medical Leave insurance program (“PFML Program”) created by the Healthy Delaware Families Act (the “Act” and generally, “Delaware Paid Leave”). The publication triggered a 30-day Public Comment period during which time members of the public were invited to provide their feedback on the proposed regulations. The Division received 35 sets of comments, which largely focused on individual scenarios particular to the organization submitting the questions and covered a wide range of subjects. Based on these comments, the Division made a number of changes and provided clarification to the proposed regulations, which were then published as [Final Regulations](#) on July 1st. The Final Regulations became effective July 11, 2023.

The Division does not respond to individual public comments. The Final Regulations reflect general responses based on comments received, however, many of the comments received reflected changes to the Act itself, which is beyond the scope of the Division’s authority. Due of the nature of other questions and comments received, the Division is providing general responses in the form of Frequently Asked Questions (FAQ) document, organized by topic.

Regarding: General Questions and Concepts

Who is an “employer” under the Act?

An employer is anyone who employs individuals to work at a location in the State of Delaware. There are some exclusions to this definition. For purposes of the Act, an employer does NOT include:

- (1) anyone who employs 9 or fewer employees in the State in the 12 previous months;
- (2) the federal government; and
- (3) any business that is completely closed for 30 consecutive days or more per year.

How are franchises handled? Are they considered to be a joint employer?

For the purposes of the PFML Program, the entity that pays a worker’s paycheck is almost always considered the individual’s employer. Whether a franchisor or other business entity is a “joint employer” is a fact-specific determination. The PFML Program will follow the rules about joint employers established by the federal FMLA program.

If I own two or more businesses, am I an integrated employer?

Whether two businesses would be considered an integrated employer for the purposes of the Delaware Paid Leave program is a fact-specific determination. The PFML Program will follow the rules about integrated employers established by the federal FMLA program. The factors to be considered include:

- (1) common management;
- (2) interrelation between operations;
- (3) centralized control of labor relations; and
- (4) degree of common ownership/financial control.

Who is an “employee”?

Although an individual may work for an employer, they are not considered an “employee” under the terms of the Act unless they work primarily in Delaware. This means the individual must physically work in Delaware 60% of the time. If an individual does not primarily work in Delaware, they are not considered an “employee” and are not subject to terms of the Act.

Who is a “covered individual”?

A covered individual is an employee who has worked for an employer for 12 months and has worked at least 1,250 hours in the past 12 months (approximately 24 hours per week on average).

Which employees can be placed on a waiver?

Any individual who works in Delaware but does not or is not expected to meet the definition of a “covered individual” may sign a waiver to indicate the employee will not be participating in the PFML Program. “Waivers” are reserved for those individuals who:

- (1) are temporary employees whose term of employment is likely less than 12 months (such as students working during the summer months); or
- (2) work part-time (average less than 24 hours per week).

When an employee is hired, an employer should have an idea as to whether that employee is intended to be a permanent or temporary employee, and how many hours the employee is expected to work. For example, if an employer believes an employee will only be working 20 hours per week or an employee is expected to only work the holiday season, the employee may be placed on a waiver as the employer can reasonably expect the employee will not be considered a “covered individual” under the Act. Waivers cannot be used as a way to decline coverage for those employees who *should be* regarded as covered. Paid leave coverage is mandatory for employees who are “covered individuals.”

If an employer determines that an employee, based upon the terms of their employment, is not a “covered individual,” the employer must notify the employee of the need to file a waiver. This notification must be done within the fiscal quarter of making such determination. Both the employer and the employee need to sign the waiver form. When an employee is on a waiver, neither the employer nor the employee needs to make any PFML contributions. Employees on waivers are NOT included in an employer’s employee threshold count (i.e., towards the 10 or 25 employee minimums for various coverages).

Employers must send hours and wage information for all employees, including those on waivers, to the Division as part of their quarterly contribution submission. Once an employee is on a waiver, the Delaware Paid Leave system will track the number of hours and months that employee works. Should the employee approach the minimum 1,250 hours of work during the previous 12 months or the 12 months of employment needed to be considered a “covered individual,” the Delaware Paid Leave system will notify both the employer and employee that the individual will soon subject to the requirements of the Act.

At that point, the employer should take action to revoke the waiver and include the employee in the Delaware Paid Leave plan (or an approved private benefit plan) to avoid incurring any back-contributions or penalties.

If an employee is not put on a waiver and they work primarily in Delaware, the employer is required to make the mandated contributions. No waiver is required for an employee who does not work “primarily” in Delaware as this individual is not considered an “employee” under the Act.

What hours and wages are “counted” under this program?

Delaware Paid Leave is a state law that does not apply to hours and wages earned outside of the State of Delaware. Only those hours worked physically in the State of Delaware and those wages earned from those hours worked within the boundaries of the State of Delaware can be considered under this plan. Hours and wages that are earned outside of Delaware:

- Are not subject to the program’s 0.8% contribution rate;
- Do not accumulate towards either the 12 month or 1,250 hour requirements to be considered a “covered individual”; and
- Are not used in the calculation of an employee’s benefits while out on approved Leave.

However, employees who work in Delaware but reside outside of Delaware (i.e., are non-Delaware residents) are subject to the program. Non-Delaware residents who work in Delaware and are covered individuals can apply for benefits and take approved paid leave.

Which workers can be reclassified as “employees”?

An employee working for a Delaware employer who is not physically located at a worksite in Delaware, either because they telecommute from out-of-state or are temporarily assigned to a location in another state, can be “reclassified” as an employee for purposes of the Delaware Paid Leave plan, if both the employer and the employee agree and sign a reclassification form.

If an employee is “reclassified,” then the employee is included in the employer’s employee threshold count, employee and employer contributions are required, and the employee will be eligible to apply for benefits under the Delaware Paid Leave plan. The reclassification process is strictly for employees who would otherwise work in Delaware if not for telecommuting or temporary assignment outside of Delaware.

Once an individual has been reclassified as an employee for the purposes of this Act, they must have worked for 12 months and 1,250 hours in the previous 12 months for the employer (neither of which is required to have been performed inside the State of Delaware due to the reclassification) before becoming a “covered individual” and eligible for benefits.

Can an employer or employee decline coverage and not participate in the PFML program if they are otherwise eligible?

No. Employers who meet the definition of an “employer” under the Act are obligated to provide paid leave benefits, and all employees who qualify as covered individuals are required to have coverage through either the Delaware Paid Leave plan or an approved private benefit plan provided by the employer. As explained above, this does not include employees placed on waivers due to their part-time hours or temporary employment.

Regarding: Employer’s Employee Threshold Count

How do you determine an employer’s employee threshold count?

An employer’s threshold count is determined by counting the number of Delaware employees an employer has.

- Starting point – all Delaware-based employees who work primarily (at least 60% of the time) in Delaware.
- Subtract – all employees who have signed Waivers.
- Then add – all employees who have signed a Reclassification form.

Initially, the employer’s threshold count will be based upon the number of employees an employer has in 2024.

What happens at the different employee thresholds?

The threshold count is used to determine what type of paid leave coverage, if any, an employer is required to provide.

- Employers with less than 10 employees in their employee threshold count are not required to participate in the paid leave program.
- Employers with 10-24 employees in their employee threshold count are only required to provide parental leave benefits.

- Employers with 25 or more employees in their employee threshold count are required all the lines of coverage (parental, family caregiving, medical, and qualified exigency leave).

How will an employee's benefits change when the number of employees rises above or falls below a threshold number?

In general, benefits under this program are easy to gain and hard to lose. Once an employer's employee count rises to a threshold number (either 10 or 25), an employer must then provide the required lines of coverage for at least 12 months. For example:

- If an employer's threshold count reached 10 employees in June of 2025, the employer is required to provide paid parental leave benefits until at least May of 2026.
- Coverage would begin 30 days after the threshold was exceeded and notice would be provided by the employer to their employees of the new coverages.

An employee count would have to stay below the threshold number for 12 straight months in order for an employer to drop previously required coverage(s). In the example above, if the same employer's employee count decreased to 9 in December of 2025, the employee count must stay below 10 for at least 12 consecutive months before the employer is allowed to reduce the benefits provided to their employees. Therefore, the number of employees would have to remain at or below 9 from December, 2025 through November 2026 before the employer could stop providing paid parental leave benefits.

When the obligation to provide leave benefits ends, no further contributions for the applicable line(s) of coverage will be required, and employees will not be eligible for paid leave. However, once an employer's threshold count rises again to 10 employees, contributions will resume, and covered individuals will be eligible for paid leave benefits for at least another 12 months.

Once an employer begins to provide wage and hourly data to the Division (information that is reported on every employee's paycheck), the Delaware Paid Leave computer system will track the number of employees an employer has, as well as whether an employee has been reclassified or placed on a waiver. The system will calculate the employer's employee threshold count, advise them on their required contribution amount, and provide an estimated benefit payment amount once a claim is filed based upon the employee's average weekly wage.

Regarding: Types of Leave, Length of Leave, and Application Year

What types of leave are available under the Delaware Paid Leave program?

The program provides for up to a total of 12 weeks of leave in an application year. The types of leave available are:

- (1) Parental Leave – up to 12 weeks every 12 months to care for and bond with a child during the first year after the birth, adoption, or placement of a child;
- (2) Medical Leave – up to 6 weeks every 24 months due to a serious health condition that prevents the employee from performing the employee’s job duties;
- (3) Family Caregiving Leave – up to 6 weeks every 24 months to care for a family member (parent, child, or spouse) with a serious health condition; and
- (4) Qualified Exigency Leave – up to 6 weeks every 24 months to handle matters arising from a family member’s overseas military deployment.

Under the Delaware Paid Leave plan, the minimum length of paid leave an employee may take is 1 day. This differs from FMLA, which permits leave as short as 1 hour. An employee who is permitted to take FMLA leave can continue to take leave in increment shorter than 1 day, but for PFML purposes, it will be unpaid and it will not accumulate towards the PFML duration maximums.

Does the Act provide an adjustment period to assist small businesses with the transition into providing paid leave benefits?

Small businesses, meaning those with an employee threshold count of 10-24, are only required to provide Parental Leave benefits for their employees. Small businesses may also temporarily reduce the length of paid parental leave from 12 weeks to some period of time between 6 and 11 weeks, for a period of up to 5 years from the start of benefits (through December 31, 2030). Any small business that wishes to decrease the length of its parental leave benefit must notify the Division of Paid Leave by **January 1, 2024**. The Division’s online portal will be open beginning **October 1, 2023** and will remain open until **January 1, 2024** for small businesses to make this selection if they choose.

Is an employee required to use their paid time off prior to being eligible for paid leave benefits?

Whether or not an employee is required to use their paid time off (which can include vacation, sick, or personal time) prior to accessing Delaware Paid Leave plan benefits is up to the

employer. Employees must be notified of the employer's policy regarding paid time off and paid leave benefits and whether an employee must use paid time off prior to taking paid leave. However, the Act requires that an employee cannot be required to use all of their paid time off prior to accessing paid leave benefits. The maximum amount of paid time off an employee may be required to use will be addressed in future regulations and is expected to be 75% of the employee's remaining time off at the time leave is taken.

What is the purpose of an "application year"?

The application year is the method selected by an employer to determine if an employee has the ability to take leave during a specific 12 month period. An employer can choose from the four different application year methods, as defined by the FMLA:

- "Calendar year" is a 12-month period that runs from January 1 through December 31;
- "Any fixed 12-months" is a 12-month period such as a fiscal year, a year starting on an employee's anniversary date, or a 12-month period required by state law;
- "12-month period measured forward" is a 12-month period measured forward from the first date an employee takes family and medical leave. The next 12-month period would begin the first-time family and medical leave is taken after completion of the prior 12-month period; or
- "A 'rolling' 12-month period measured backward" is 12-month period measured backward from the date an employee uses any family and medical leave. Under the "rolling" 12-month period, each time an employee takes family and medical leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the immediately preceding 12-months.

The method chosen by the employer must apply to all employees. For example, an employer may select the calendar year from January 1 through December 31 as its application year. If this method is chosen, then an employee, if otherwise eligible, would have the ability to take leave at any time during a calendar year if they have not yet taken leave. If an employee took 6 weeks of medical leave in June of 2025, for example, using the calendar year as the application year, the employee would not be eligible for medical leave again until January of 2027, since an employee is permitted to take up to 6 weeks of medical leave every 24 month period. If an employer decides to change its application year method, the employer must provide its employees at least 60 days' notice of this change.

The "calendar year" approach for the application year is typically the easiest to apply for employers, employees, and the Division.

Regarding: Contributions

Who makes the required contributions to fund the Delaware Paid Leave plan?

An employer is mandated to pay 100% of the required contributions to the Division of Paid Leave through the Family and Medical Leave Insurance Account Fund (the “Fund”). However, an employer is permitted to withhold up to 50% of the required contribution from the employee’s pay, so that the cost of the program is shared by the employer and employee. An employer may pay 100% of the cost of this program if they wish.

The contribution split may vary based upon employee classification, provided the classification does not discriminate against a legally protected group.

The employee’s share of the contribution must be withheld from the employee’s paycheck at the time it is assessed. An employer is not permitted to collect back contributions or to invoice an employee for contributions. This is a common provision for all paycheck deduction programs. All contributions paid into the Fund will be utilized to pay future claims and operate the program.

The Delaware Paid Leave system will provide an estimated calculation of the required contribution to all participating employers based on the employees’ status (including reclassification and waivers) and wage and hour information submitted by an employer. Individual employee contributions will be limited to the Federal Insurance Contribution Act (FICA) wage limit.

If an employer decides to change the contribution split, the employer must notify the Division no later than December 15th, with the change becoming effective 16 days later on January 1. The employer is free to notify its employees, payroll service, third party administrator, or the Division at any time prior to December 15th if they wish to change to the contribution split for the next year.

How is the contribution rate determined?

For the years 2025 & 2026, the Act sets the contribution rate at 0.8% of wages. If an employer wishes to create a hybrid plan where different lines of coverage are provided by different means (for instance, Medical Leave through an insurance policy, Family Caregiver/Qualified Exigency Leave provided by a self-insured plan, and Parental Leave through the Delaware Paid Leave program), the Act also provides component contribution rates of:

- 0.4% for medical leave;

- 0.32% for parental leave; and.
- 0.08% for family caregiving leave.
 - As the Act did not create a separate rate for Qualified Exigency leave, the Division has determined that Family Caregiving and Qualified Exigency Leave will always be taken together, whether in the Delaware Paid Leave plan or through a private plan.

The above contribution rate will be recalculated annually by the Department of Labor beginning in 2027 based upon the formula set by the Act. In rare and critical situations, the Act gives the Secretary of Labor the discretion to lower benefits to preserve the stability of the PFML Fund.

As an example, for an employee making \$50,000 a year, the maximum contribution an employer and employee would each be required to pay for all lines of coverage (parental, medical, and family caregiving/qualified exigency), based upon a 50/50 split in the contribution rate would be less than \$3.85 per week or \$200 annually ($(\$50,000 \times .008)/2 = \200).

How are contributions made if an employee has 2 full-time jobs or 1 full-time and 1 part-time job and works more than 1,250 hours in a 12 month period?

Contributions will be made separately by each employer, with the employee paying whatever share the employer requires while on the clock with that employer, until the employee's total earnings reach the FICA wage limit. Neither employer is considered primary. Should an employee need leave and is a covered individual, the employee would make a claim with both employers separately, if taking leave from both positions, with each employer making a separate determination based on the facts and circumstances around their individual employee-employer relationship.

How are contributions to be reflected on an employee's W-2?

- The Division is unable to give any tax or legal advice to employers or employees. Please contact your accountant or attorney for assistance.

Regarding: Filing a Claim and the Claim Process

How much notice does an employee have to provide before taking leave?

Employees are expected to provide 30 days advanced notice of their need for leave, if at all possible. For example:

- For parental leave, an employee should be able to provide 30 days' notice as the need for leave is triggered by a specific event, which date is most likely known to the employee.
- In situations where the need for leave arises due to the sudden onset of a serious health condition (e.g., a heart attack), the employee or their representative should notify the employer as soon as possible, at least by the next business day after the need for leave arises.

How do you file a claim for paid leave under the Delaware Paid Leave plan?

The employee who is requesting leave creates an account in the Delaware Paid Leave system, found on the Division's website. Once an account is created, the employee completes and submits the application electronically. The information required from the employee depends upon the type of leave requested. All required forms will be available on the Division's website so that any information needed for the application can also be submitted electronically. For example:

- If an employee is applying for family caregiving leave, a self-certified statement of the relationship between the employee and the family member for whom they need to care is required.
- If the need for leave results from an employee's or family member's serious health condition, as part of the Claim Application, the employee must provide the name and contact information, including a valid email address, for the individual's healthcare provider. The system will then automatically send the healthcare provider a Serious Health Condition Certification form for them to complete and return.

Can an employee have help filing a claim?

Yes, an employee may have help filing a claim. An employee can appoint a Designated Assistant to help with the claim form, the process, and any aspect of their claim. This can be a family member, trusted friend, or an employer. A form will be available on the PFML

system for the employee to complete and all relevant parties will be notified of the Designated Assistant's contact information.

The Division of Paid Leave and the employee's employer are also required to provide reasonable assistance to the employee (or their Designated Assistant) as they try to fill out the forms. The applicant is still responsible for collecting the required information, but the Division or the employee's employer should help them put that information into the correct online form if assistance needed.

How will an employee file a claim if they do not have access to the internet?

If an employee does not have a smart phone or internet access at home or work, there are several avenues of assistance available to an employee. Employers and the Division are both required to provide reasonable assistance to their employees to properly complete all the online forms created by this Division for this insurance program, including claim forms, claim review forms, and appeals. "Reasonable assistance" means that employers and the Division must help the employee put the required information into the forms; it does not mean that the employer or Division must help the employee find the necessary information.

Computers are available for use at all public libraries. The Wilmington Public Library, for example, has 25 computers for general public use in their Technology Center. All of the public computers are connected to a printer and there are 2 special accessibility computers in the library's Inspiration Space. These computers have ZoomText and Jaws downloaded on them. ZoomText Magnifier/Reader is a fully integrated magnification and reading program tailored for users who are visually impaired. Magnifier/Reader enlarges and enhances everything on the computer screen, echoes the typing and essential program activity, and automatically reads documents, web pages, and email. Jaws (which stands for Job Access with Speech) is a screen reader specifically designed for people with vision impairments or disabilities. This assistive technology will help individuals navigate and interact with display content more easily. Optical character recognition (OCR) technology can turn images and graphics into text for easier consumption.

The DOL also has public computers available. At Fox Valley, for example, there are 20 public computers as well as DOL employees on hand to ask for assistance.

The Division will provide reasonable assistance to all employees covered by the Delaware Paid Leave insurance program to help employees properly complete all online forms relating to this insurance program. This assistance will include accepting a claim application for an employee over the telephone, if necessary.

The Division will not accept any physical form, including a printed claims application, whether typed or hand-written, whether dropped off in person, mailed, faxed, or otherwise delivered. All required information must be completed and submitted through the online portal.

As an employer, I am concerned with HIPAA and protecting the confidential personal health care information of my employees. How will confidential personal health care information be handled in the Delaware Paid Leave plan?

The Division seeks to limit the disclosure of confidential personal health care information of any employee seeking paid medical leave benefits due to their own serious health condition or family caregiving leave due the serious health condition of a family member. Any employee seeking paid leave benefits will be required to authorize their medical provider to fill out a Serious Health Care Certification form and disclose only information necessary for processing their PFML claim. The Delaware Paid Leave program forms will be similar to forms used for FMLA purposes.

To further protect the employee, however, the Serious Health Care Certification form itself will contain a limited amount of personal health care information and no medical records will be required to be submitted to the Division or the employer in support of an employee's initial request for medical or family caregiving leave. In very rare instances, medical records may be requested in rare instances to determine whether payments were made due to fraud.

In addition, the Act provides that all information pertaining to a covered individual is confidential and not open for public inspection. The Division's administrative system is designed to meet or exceed HIPAA standards in the event such information is submitted to us by a health care provider or claimant, even though that information was not requested.

How is a claim processed under the Delaware Paid Leave plan and who decides if a claim is paid?

An employee files a claim for paid leave using the Division of Paid Leave's online portal. Depending on the type of leave requested, there may be some additional forms that must be completed online, such as a Certification of a Serious Health Condition. If any additional forms are required, the appropriate party will be notified by the Division's online system that the forms need to be completed.

The system will send reminder notices to the healthcare provider if a medical certification is needed and to the employer and employee so that all involved parties are aware of the status of the claim. An employee is obligated to follow up with their health care provider if

the medical certification has not been submitted in support of the employee's request for medical or family caregiving leave. Health care providers will receive a financial incentive if they quickly return the Certification of a Serious Health Condition.

Once all required forms for the type of leave being requested are completed, the employer will receive an advisory notice from the system, recommending the claim either be approved or denied. The final decision, however, is up to the employer as the employer has more knowledge and information regarding the employee's particular situation than is available to the Division. Once all of the necessary information is received, the employer has 5 business days to make a decision to approve or deny the claim (a process that should generally take a couple of minutes).

The Division will not override an employer's claim decision. If an employer approves a claim, it will be paid. The approval will be effective the date the requested leave begins. If an employer denies a claim, it will not be paid. However, an employee may appeal the employer's decision. The Division will review the employer's decision on appeal and may either affirm or overturn the employer's decision based on additional information submitted by the employee and/or employer. Either party then has the right to appeal to the Paid Family and Medical Leave Appeal Board (the "PFML Appeal Board") if they disagree with the decision of the Division on appeal. The PFML Appeal Board's decision can be then appealed to the Delaware courts, if desired.

How will an employee be notified if their claim is approved or denied?

If the employer is part of the Delaware Paid Leave plan, an employee will receive all notices regarding their claim through electronic mail, at the email address provided in the employee's claim application. If an employee is part of a private insurance or self-insured plan, the employee will be notified according to their plan's documents.

When is recertification permitted?

Recertification of a serious medical condition under the Act will only occur if there is a reasonable basis for questioning the opinion of the patient's healthcare professional. A request for recertification must be based upon objective, specific evidence that brings the seriousness of the person's health issue into doubt.

For continuous leave, an employer cannot request recertification more than once in a 30 day period. If the health care provider's certification indicates that an employee will be out of work for at least 60 days, an employer may not request a recertification until that 60 day time period has expired, unless there is a reasonable basis to do so. To prevent abuse of

the recertification process, any recertification request must be sworn to and notarized by the person making it.

If an employee is on reduced or intermittent leave, an employer may request a recertification once every 90 days, without the need to establish doubt regarding the seriousness of the covered individual's medical condition. The difference between the recertification process for continuous and intermittent leave is because intermittent leave typically occurs over several months and an employee's condition may have changed during the time and continuous leave occurs over a shorter time period.

If a recertification is not covered by an employee's health insurance plan, then the employer requesting recertification is financially responsible for the cost associated with the request.

Regarding: Private Benefit Plans

If an employer has a private insurance plan, can the employer opt out of the Delaware Paid Leave plan?

Yes, an employer may provide the benefits required under the Act through an approved private insurance plan, provided all requirements of the Act and regulations are met. The private benefit plan can provide coverage for just one type of coverage or for all four lines of coverage. If an employer selects to cover some but not all lines of coverage through a private plan, then the other lines of coverage not covered by the private benefit plan shall be covered under the Delaware Paid Leave plan.

The Delaware Department of Insurance has begun the process of reviewing insurance applications to determine whether the policies meet or exceed the minimum requirements of the Act. A list of approved plans will be made available on the Division of Paid Leave's and/or the Department of Insurance's website. Each year, from October 1 through December 1, employers can apply to the Division for private benefit plan approval, selecting one of the plans identified by the Department of Insurance as meeting the requirements of the Act.

Once the employer's private plan is approved, the employer will be able to utilize this plan in lieu of the Delaware Paid Leave plan to provide paid leave benefits to their employees for the following calendar year.

If an employer has an approved private benefit plan, are they required to make contributions to the Delaware Paid Leave plan?

No, an employer who has an approved private benefit plan is not required to make contributions to the Delaware Paid Leave plan.

Can an employer self-insure?

If an employer has at least 100 employees, the employer can apply to self-insure to provide the paid leave benefits required by the Act. In addition to having a written plan, the employer must also demonstrate they have the financial ability to self-insure by prefunding and maintaining a dedicated bank account for the payment of claims and provide a surety bond based on a risk analysis signed by an actuary or CPA. The purpose of these requirements is to protect the employees and help guarantee that benefits will be available as required by the Act. Any self-insured plan must be approved by the Division of Paid Leave prior to use by the employer. We will provide a self-insured policy template to simplify the process for employers who wish to manage their own legally compliant private benefit plan program. Employers may apply to self-insure from October 1 through December 1 each year, for use beginning the following January.

Are there any exceptions to the 100-employee minimum for Delaware employers to self-insure?

The Division realizes that some larger multi-state employers may have a smaller Delaware presence. If an employer in this situation can demonstrate that it has the administrative capacity to self-insure when applying for private benefit plan approval, the Division may approve their application to self-insure, even though the number of Delaware employees is less than 100, provided all other requirements of the Act are met.

Is a public employer required to provide a surety bond if approved to self-insure under the Act?

No, public employers (e.g., municipal and County governments) are not required to provide a surety bond if approved to self-insure per the explicit language set forth in §3716(a)(2)a of the Act.

Can a private benefit plan offer longer periods of leave or approve leave more frequently than required by the Act?

Yes, a private benefit plan can offer more generous benefits than what is required by the Act. The Act provides the minimum types and lengths of leave an employer must provide to

its employees. An employer, through a private benefit plan, can always offer more generous benefits to its employees.

There are several ways that an employer can structure a more generous PFML plan.

1. If there is a DOI-approved plan that offers richer benefits than the Act requires, employers can simply select and purchase that policy.
2. They could also opt-out of the Delaware Paid Leave plan to provide more generous benefits through a self-insured plan, taking on all the financial risk.
3. Alternatively, an employer could choose to remain in the Delaware Paid Leave insurance plan, which would provide coverage up to the limits required in the Act, and then the employer could provide additional benefits through a self-insured plan that would pay out just the additional benefits over and above what is required under the Act.

Do employers who are using approved private benefit plans also have to upload claim documentation into the Delaware Paid Leave system?

Yes, this requirement applies to all employers, regardless of whether they are utilizing the Delaware Paid Leave plan, an approved private insurance plan, self-insure or use a third party administrator to meet the requirements of the Act. This information is required for appeals, auditing, and reporting.

Do employers who are using an approved private benefit plan have to provide enrollment, wage, and hour information to the Division of Paid Leave?

Yes, all employers must provide this information to the Division. This information is required for appeals, auditing, and reporting.

Regarding: Grandfathering Existing Benefits

Is an employer's approved grandfathered benefit a benefit plan under the Act?

Yes, an employer's existing paid leave benefit that was approved for grandfathering as comparable to the benefits provided by the Delaware Paid Leave plan can be used by an employer for a period of up to 5 years, through December 31, 2029, to satisfy the requirements of this Act.

An employer can apply to have an existing benefit offering any or all types of paid leave grandfathered. All employers seeking grandfathering approval of an existing benefit must

apply to do so between **October 1, 2023 and January 1, 2024** via the Division’s online grandfathering application portal, which can be found on the Division’s website.

To be grandfathered, the paid leave benefit must have been in existence, in writing, on May 10, 2022 and the design must offer benefits that are within 10% of the following policy elements:

- Benefit Percent – the Act has a benefit percent of 80% of an employee’s average weekly wages, a comparable plan must provide a benefit of at least 72% of wages.
- Maximum Weekly Benefit – the Act has a maximum payment of \$900, a comparable plan must provide a benefit of at least \$810 per week.
- Leave Durations – this policy element differs by line of coverage:
 - Parental Leave – the Act provides up to 12 weeks of Leave, so comparable plans must provide at least 54 days.
 - Medical, Family Caregiver, & Qualified Exigency Leave – the Act provides 6 weeks of leave, so comparable plans must offer the employees at least 27 days of leave.

To be considered “comparable” to the Act, an employer’s existing Parental Leave benefit must also provide coverage for birth, adoption or foster care placement of a child and be available to both parents, regardless of sex, gender, and/or marital status.

Regarding Benefit Payments and Leave

How much is an employee paid when on leave?

An employee is paid 80% of an employee’s average weekly wages, up to the \$900, the current maximum weekly payment allowed under the Act. The minimum payment is \$100. If 80% of the employee’s average weekly wages is less than \$100, then the employee’s benefit will instead be their average weekly wage. The maximum benefit will be adjusted for inflation beginning in 2028 in accordance with a formula provided in the Act. Grandfathered benefits may offer coverage that is slightly less than what is required under the Act (see above) and private plans are able to offer richer benefits than what is required under the Act.

Will an employee's benefits ever decrease?

Although this is very unlikely, the Act does provide the Secretary of Labor with the authority to decrease employee benefits if the balance of the Paid Family Medical Leave Insurance Account Fund is in jeopardy. This determination will be made according to a formula that is provided in the Act. This will only happen if the contribution rates in the Act are insufficient and a rate increase (which would require an amendment to the Act) is not possible. The Division of Paid Leave will provide at least 90 days' notice if this unlikely event should occur. Any change in benefits under this provision will remain in effect for 12 months.

How is an employee's "average weekly wage" calculated?

An employee's average weekly wage is determined by taking the employee's gross salary over the past 12 months prior to the submission of a claim and dividing that by 52. The Delaware Paid Leave program will calculate an employee's average weekly wage for the employer based upon the hour and wage data provided by the employer to the Division of Paid Leave. The Act defines an employee's wages by the same regulations that are used by the federal government's FICA standards, which are used in the calculation of Social Security taxes and benefits.

What if an employee has more than one job? How is the "average weekly wage" calculated then?

The average weekly wage calculation is done separately for each job the employee may hold.

Are taxes going to be withheld from a claimant's benefit payment?

Yes, the Act requires federal and state income taxes to be withheld from a covered individual's paid leave benefits. State income taxes will be held at a rate of 3%, while federal income taxes withholding will be based upon Delaware's average effective federal income tax rate. This may produce under- or over-payments in different amounts for different taxpayers. However, employees will be able to correct any under or over payment issue when preparing their annual tax return.

If an employee was supposed to be on leave for 5 weeks, but returns to work after 3 weeks, do they still receive paid leave benefits?

If the employee is part of the Delaware Paid Leave plan, the employee may receive up to 1 week of benefit payments if they return to work early, as a financial incentive for their

early return to work. The employee's actual leave period will end at 3 weeks, so that the employee will have 3 additional weeks of leave remaining if so needed.

What happens if the family member for whom the employee is caring passes away while the employee is on leave?

If this unfortunate situation should occur, and the employee is part of the Delaware Paid Leave plan, the employee has 72 hours to notify the Division of the change in leave status due to the death of the family member. Leave benefits will continue for 1 additional week or the end of the schedule leave period, whichever is earlier. The Division recognizes that the loss of a family member may impact the employee's mental health, which is just as important as physical health, and that such a loss may be a very difficult and emotional time in the employee's life.

How is family caregiving leave handled if multiple family members work for the same employer?

Employees who are family members who work for the same employer are each entitled to 6 weeks of paid family caregiving for the same qualifying event. However, leave cannot be taken concurrently, unless the employer has a policy to permit all of their similarly situated employees to take their leave consecutively.

Can an employee quit a job after taking leave?

Delaware is an at-will employment state. Unless there is an employment contract stating otherwise, both an employer and employee can terminate an employment relationship at any time. Requiring employees to work when they wish to quit is akin to servitude and is not permitted by law.

Regarding: Job Protection and Anti-Discrimination

What can an employee do if an employer refuses to allow leave based upon an employee's sexual orientation?

An employee can file a complaint with the Division of Paid Leave. All provisions of the Healthy Delaware Families Act are subject to the state's anti-discrimination laws.

Does the Act provide any job protection?

A covered individual who takes leave is entitled to be restored to the position the employee held when leave began or to an equivalent position as defined in the Act.

Regarding: Appeals

Can any decision be appealed?

Yes, either the employer, third-party administrator (TPA), the employee, their Designated Assistant, or attorney may appeal any decision made by the Division of Paid Leave, the employer, their insurer, or TPA. This includes appeals regarding claims, eligibility, benefit amount, and private benefit or self-insured plan approval.

An employee may ask the Division to review a claim decision made under the Delaware Paid Leave plan. The request for review must be made within 60 days of the claim determination. Private benefit plan claims will follow the internal review process established by the private benefit plan. All other matters, including an appeal of the Division or private benefit plan review, will be filed with the Family and Medical Leave Appeal Board. Appeals to the Appeal Board must be filed within 30 days from the date of the determination.

Regarding: Help

What types of resources will be available to assist employers and employees?

The Division of Paid Leave's website will contain numerous resources, including how to videos, forms, checklists, and frequently asked questions for employers, employees, insurance carriers, and third party administrators to help assist all parties meet the requirements of the Act and these regulations. You may also contact the Division of Paid Leave 24 hours per day, 7 days a week, (almost) 365 days per year with any questions not answered on the website.