

Get ready for Delaware Paid Family and Medical Leave (DE PFML)

On April 14, 2022, the Delaware's General Assembly passed a paid family and medical leave insurance bill which Governor Carney signed into law on May 10, 2022. Most employers with ten or more employees in the state will be subject to the law. The program will be funded through payroll contributions and will provide the opportunity for eligible employees to take job protected, partially paid leave for certain covered leave reasons discussed below. Contributions to fund the program will begin January 1, 2025. Paid leave benefits will be available starting January 1, 2026. Private PFML plans will be available to employers who elect to provide leave benefits that are at least as generous as the state program benefits on either a fully insured or self-insured basis.

Applicability & Opt-In. The law applies to all employers who have employed 10 or more employees working in the state of Delaware during the previous 12 months. Employers with 10 to 24 employees working in Delaware during the prior 12 months are subject only to the paid parental leave requirement of the law, while those with 25 or more employees working in Delaware during the prior 12 months are required to provide paid leave benefits for parental, family caregiving, and an employee's own serious medical reasons.

A small business, is defined as an employer with 9 or less employees working in Delaware for purposes of parental leave, and as an employer with 24 or less employees working in Delaware for the purposes of family caregiving and medical leave. Small businesses may opt into the program and voluntarily choose to provide parental, family caregiving, or medical leave benefits by providing notice to the Department of Labor (DOL). The decision to opt in will remain in force for a period of at least 3 years and the small business may only opt out with 12 months' notice to the DOL, provided such notice will not take effect sooner than the expiration of the 3-year period.

The law does not apply to the federal government and any business that is closed in its entirety for 30 consecutive days or more per year.

Covered Individuals & Employees. "Covered individuals" include employees who have been employed by the employer for at least 12 months and have worked at least 1,250 hours in the 12-month period prior to their leave. These are the same requirements as the federal Family and Medical Leave Act (FMLA). The terms "employee" is defined as including an individual who primarily reports to work at a worksite in Delaware. Employees who primarily work outside Delaware are not considered employees eligible for DE PFML unless the employer elects to re-classify them as Delaware employees. In addition, employers may reclassify an employee as primarily reporting for work at a worksite in another state (not Delaware) for the purposes of the DE PFML law for the duration of the individual's tenure at the out-of-state worksite. Employees do not include seasonal employees employed by the state, including seasonal employees of public schools, who are employed on a temporary basis pursuant to Delaware Code § 5903(17)a. of Title 29.

Leave Reasons. Covered leave reasons include:

- 1) Parental leave due to the birth, adoption, or foster care placement of a child within the first 12 months of the birth, adoption or foster placement;
- 2) Family Caregiving for a family member with a serious health condition or due to qualifying exigency as defined in the FMLA; or
- 3) Medical leave due to the covered individual's own serious health condition that makes the covered individual unable to perform the functions of the covered individual's position.

Covered family members. Delaware's law defines family member for the purposes of parental and family care-giving leave to include parent, child or spouse and specifically incorporates definitions of the same family members under the FMLA. Those definitions are:

- **Child** for the purposes of bonding and care for a family member with a serious health condition includes a biological, adopted, foster, stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that leave is to commence. For the purpose of qualifying exigency, a child on covered active duty or call to covered active-duty status includes the covered individual's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active-duty status, and who is of any age.
- **Parent** includes a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered individual when the covered individual was a child as defined above. This term does not include parents "in law."
- **Spouse** means a husband or wife as recognized by state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in

Definition of serious health condition. The Delaware PFML law incorporates the FMLA's definition of "serious health condition" and includes an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility or continued treatment by a licensed health care provider. The law also incorporates the FMLA's definition of "health care provider."

Duration. As noted above, the duty to provide different leave benefits varies by employer size. Employers with 10 to 24 employees working in Delaware must provide only paid parental leave. Employers with 25 or more employees working in Delaware must provide medical and family caregiving leaves in addition to paid parental leaves. A covered individual will be able to take a maximum of 12 weeks of family and medical leave benefits in an application year.

- The maximum number of weeks available for parental leave is 12 weeks per application year.
- The maximum aggregate number of weeks of family caregiving, qualifying exigency, and medical leave is 6 weeks per any 24-month period.

Family and caregiving benefits are only available one time any 24 month period. This limitation does not apply to parental or medical leave benefits, if applicable.

Married Couple Rule. The DE PFML law does not adopt the "married couple" rule. Instead, it provides that if two parents are entitled to parental or family caregiving leave and employed by the same employer, the aggregate number of weeks of leave to which each are entitled may be limited by the employer to 12 weeks in any 12-month period.

Application year. The application year is the 12-month period as defined by the federal Family and Medical Leave Act. Under the federal Family and Medical Leave Act employers can select one of four leave year methods: calendar year, fixed year, rolling forwards, or rolling backwards. At this point, it is unclear whether the state plan will endeavor to capture each individual employer's decision related to application year method or whether the state will adopt a uniform leave year method for purposes of the state plan.

Intermittent leave. Intermittent and reduced schedule leave is available when medically necessary and supported by documentation. Benefits are prorated for intermittent and reduced schedule leaves. The requirement for intermittent and reduced schedule leave to be medically necessary may preclude the availability of intermittent or reduced schedule leave for bonding with a new child. The law provides that benefits are not payable for less than one work-day of covered leave taken in one work week.

Amount of benefits. The weekly benefit amount is 80% of the covered individual's average weekly wages rounded up to the nearest dollar during the 12 months prior to the application for leave. The term wages is defined as being remuneration for employment as determined for purposes of federal social security wage base under FICA.

The maximum weekly benefit in 2026 and 2027 is \$900. Thereafter, the maximum benefit will be increased in proportion to the annual average weekly wage increase, if any, in the Consumer Price Index and rounded to the nearest \$5.00 increment.

The minimum benefit must not be less than \$100 per week unless the covered individual's average weekly wage is less than \$100 per week, in which case the weekly benefit is the covered individual's full wage.

Premiums. Beginning January 1, 2025, the employer must remit payroll contributions at least quarterly to fund the program.

For 2025 and 2026:

- the contributions rate for medical leave benefits is 0.4% of wages;
- the contribution rate for family caregiving is 0.08% of wages; and
- the contribution rate of parental leave is 0.32% of wages.

The employer may not deduct more than 50% of the contributions owed from employees and may elect to pay all or any portion of the employee's share of contributions. The law provides that the deductions from employees' pay must be made timely and, if not, the employer is solely responsible for the full premium.

Rates will be set annually from 2027 forward based on sound actuarial principles and will not exceed the rates required to obtain a total amount of contributions equal to 125% of the prior calendar year's benefits plus 125% of the cost of administration of the payment of such benefits in the prior calendar year, less any net assets remaining in the fund as of the Dec. 31st of the immediately preceding calendar year.

If, based on actuarial principles, the contribution rate for the sum of the respective medical, family caregiving and parental leave benefits would exceed 1%, the law provides that the payable benefit will be reduced from 80% to the amount necessary to ensure the contribution rate does not exceed 1%.

Job protection & Health Care Continuation.

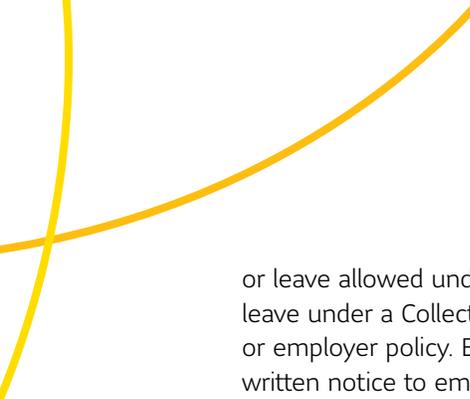
DE PFML is job protected. An employer must restore the covered individual to the position held when the covered leave commenced, or to a position with equivalent seniority, status, employment benefits, pay, and other terms and conditions of employment, including fringe benefits and service credits, which the covered individual had been entitled to at the commencement of the covered leave.

During the leave the employer must maintain any health care benefits the covered individual had before taking the leave for the duration of the leave as if the covered individual had continued in employment continuously from the date the leave commenced and until the date the leave ends.

FMLA concurrency. Leave under DE PFML will run concurrently, if applicable, with leave under the federal FMLA.

Paid Time Off. An employer may require that covered individuals use accrued paid time off before accessing family and medical leave benefits, and the use of accrued paid time off may count toward the total length of paid family and medical leave if the employee is not required to exhaust all paid time off.

Coordination of benefits. The law provides that an employer may require that payment under the DE PFML law be made concurrently or otherwise coordinated with payment made



or leave allowed under a disability or family care leave under a Collective Bargaining Agreement or employer policy. Employers must provide written notice to employees of this requirement. A covered individual may not access the statutory family and medical leave benefits if the use of such benefits would result in the covered individual's receipt of more than 100% of their weekly wages.

No waiver of rights. The law provides that an agreement by an individual to waive the individual's right under this chapter is void as against public policy.

Notice. Employers must provide notice to employees upon hire and when leave is requested, or the employer acquires knowledge that an employee's leave may be for a leave reason covered under DE PFML. The notice must include the employee's right to leave, the amount of benefits, the procedures for filing a leave claim, the existence of job protection and benefits continuation, the anti-discrimination and anti-retaliation provisions related to requesting, applying for, or using family and medical leave benefits, the employee's right to file a complaint, and whether the leave benefits are available to the employee through the state or approved private plan. Employers must also meet a poster requirement and post notice of the above enumerated rights in English, Spanish, or any language that is the first language spoken by at least 5% of the employer's workforce, if such poster has been provided by the DOL.

Private Plans. The DE PFML law creates a state-run program. An employer can apply to the DOL to establish a private plan for parental, family caregiving and/or medical leave. To be approved, the plan must meet or exceed the state plan by providing the same or more generous rights, protections and benefits to covered employees. An employer seeking a private plan must notify the DOL before January 1, 2024. Private plans can be self-insured or fully insured. If the private plan is fully insured, it must be issued by an insurer authorized to engage in the business of insurance in Delaware. If the private plan is self-insured, the employer must furnish a bond running to the state in a form and amount

approved and required by the DOL. If approved for a private plan, the employer will be exempt from making premium contributions under the state plan for a period of five years unless their private plan is revoked for violation of the terms or conditions of the plan.

Claims processing by Employers. The law seems to suggest that employees will file requests for PFML benefits with their employer even if the employer is participating in the state program. The law also provides that an employer may require that leave for a serious health condition be supported by a certification issued by the health care provider of the covered individual or covered individual's family member, as appropriate. The law sets forth the requirements for those certifications and also establishes a second opinion and recertification process.

Under the law, employers must approve or deny an application for benefits within 5 business days of receipt of a completed application that includes documentation necessary to review the claim. If the claim is denied the employer must notify the employee of the reasons for the denial. If the claim is approved, the employer must notify the DOL within three business days of the claim being approved, and the first payment of benefits must be made by the Department within 30 days after the Employer has notified the DOL of the approved claim.

Next steps. Sun Life will continue to provide updates as they become available. Employers should become familiar with the law and evaluate whether they intend to have employees obtain their benefits from the state program or whether the employer wants to establish a private plan.

Other State Paid Family and Medical Leave laws. Delaware became the 11th state to adopt a PFML program joining California, Colorado, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington. In addition, the District of Columbia has a paid family and medical leave program, Hawaii has a statutory disability program, and New Hampshire passed a paid leave mandate for state employees with the opportunity for opt in by private employers or individuals.

Group insurance policies are underwritten by Sun Life Assurance Company of Canada (Wellesley Hills, MA) in all states, except New York. In New York, group insurance policies are underwritten by Sun Life and Health Insurance Company (U.S.) (Lansing, MI). Product offerings may not be available in all states and may vary depending on state laws and regulations.

This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization has met all of the requirements under the Delaware Paid Family Leave (PFL) Act.

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