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Delaware Enacts New Paid Family and Medical Leave Requirement

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On May 10, 2022, Governor John Carney signed the “Healthy Delaware Families Act” (“the Act”) into law, making Delaware the eleventh state to offer paid family leave in the country.

Overview

- The new paid leave requirements are applicable to any employer that employs 10 or more employees in Delaware.
- The Act establishes three categories of leave including: parental leave; medical leave; and family caregiving leave.
- Employers with 10-24 employees are only subject to the parental leave provisions. Employers with 25 or more employees are subject to all leave provisions. Employers with fewer than 10 employees are not obligated to participate in the leave program,

although an employer can opt-in for a 3-year participation period.

- Benefits will be funded by employer and employee contributions. The contribution percentages have been established by the Act for years 2025 and 2026, with the state’s Department of Labor setting the contributions annually beginning in 2027.
- Contributions are scheduled to begin January 1, 2025, while benefit applications will commence January 1, 2026.

Employee Eligibility

To be eligible for, and receive benefits from the program, employees must have been employed for at least 12 months by the employer from whom leave is being requested and have worked a minimum of 1,250 hours over the 12-month period prior to requesting benefits.

The employee must also primarily work at a site located in Delaware. If the employee reports to work at a location outside of Delaware, the employer has discretion to classify that employee as eligible for participation in the state's leave program. Employees employed by the state whose work is classified as "Casual Seasonal" are ineligible to participate in the program.

Reasons for Leave

Employees may be eligible for paid family leave for the following reasons:

- To care for a child during the first year after the child's birth, adoption or after the placement of the child through foster care or for adoption;
- To care for a family member with a serious health condition;
- To provide leave to the employee due to a serious health condition that results in the employee being unable to perform the functions of their position or
- The employee has a qualifying exigency arising out of the deployment of a service member who is a family member of the employee

Benefit Amount and Duration

The program will pay 80% of the covered individual's average weekly wages during the 12-month period prior to their application. For 2026 and 2027, the benefit payments will be capped at a maximum of \$900 per week and indexed for inflation thereafter. The minimum weekly benefit cannot be less than \$100, unless the employee's average weekly wages are less than \$100 per week. In those instances, the employee's benefit will be their full weekly wage.

If the leave is intermittent or partial, benefits will be prorated but are not payable if less than one workday of covered leave is taken by the employee.

Benefits for eligible employees under the Act are capped as follows:

- Parental leave: up to 12 weeks in an application year.
- Medical and family caregiving leave: The maximum aggregate number of weeks available is 6 weeks in any 24-month period.
- Once every 24-month period for all leave except parental leave.
- If two parents are entitled to leave and work for the same employer, the employer is allowed to aggregate the number of weeks of leave to which they are both entitled to a total of 12 weeks during a 12-month period.

Contribution Rates

For 2025 and 2026, the contribution rates as a percentage of an employee's wages will be as follows:

- Parental Leave: 0.32%
- Medical Leave: 0.40%
- Family Caregiving Leave: 0.08%

An employer may deduct from the wages of each employee up to 50% of the contribution required, however, the employer at its own election can pay some or all of the employee's share of the contribution. Beginning in 2027, the contribution rates will be adjusted annually.

Employee Benefit Application

Employees who apply for benefits must provide written certification which includes the following information:

- The date when the serious health condition commenced;
- Information related to the condition provided by a healthcare provider;
- Duration of the condition; and
- A statement that they are unable to perform their job duties, or if the employee is looking to take family caregiving leave, a statement that the leave is to care for a family member who has a serious health condition.

Employer Private Plan Substitution

If the employer already has a paid leave program that provides medical, family caregiving and parental leave benefits, and that program is subsequently approved by the state, the employer will not have to remit contributions to fund the state's leave program. Employers must submit applications for approval to the state by January 1, 2024. To be approved, the employer's leave program must meet the Act's requirements and cannot impose additional conditions or restrictions beyond those permitted by the law.

If the employer's private plan does not cover all three leave types (for example, the policy only covers medical leave), the employer is permitted to participate in the state's paid leave program by remitting contributions for those leave benefits not covered by their private plan.

Employee Notice Requirements

If the need for use of leave is foreseeable, an employer

may require the employee to give at least 30 days' written notice before taking leave. If the leave is unforeseeable, notice to the employer from the employee will be due as soon as practicable.

Leave covered by this Act may also qualify as leave under the FMLA and must run concurrently with FMLA leave. Employers are permitted to require that payments made under this leave program are coordinated with payments made to the employee under a separate leave policy (e.g., employer's private plan or a collective bargaining agreement). Employers can require employees to use their unused paid time off before they can take leave covered by this Act. However, eligible employees cannot collect more than 100% of their regular wages from leave programs.

Employer Responsibilities

An employer must provide written notice to each employee of their rights under this Act at the time of the employee's hire, whenever an employee requests covered leave, or the employer has reason to believe an employee's leave is due to a qualifying event.

The notice must contain:

- The procedure an employee must utilize to file their claim;
- The amount of family and medical leave benefits;
- The employee's rights to leave benefits and job protection, as well as protection from discriminatory and retaliatory actions of their employer for requesting and/or using leave benefits, and to file a complaint for alleged Act violations; and
- Whether leave benefits are available to the employee through the state or the employer's approved private plan.

An employer must:

- Continue any health benefits that a covered employee is enrolled during any leave taken under the Act.
- Protect and restore an employee to their position (or an equivalent) prior to taking eligible leave.

If the employee is entitled to greater benefits under a collective bargaining agreement or prior employer policy, the employer is obligated to follow those policies and cannot utilize the Act as a reason to reduce

Employer Action

Employers should:

- Await published regulations from the Delaware Department of Labor and review and examine their existing paid leave policies (and their employee handbook) to determine whether they can utilize these policies to satisfy, or supplement, their requirements under the Act.
- Apply for approval with the Delaware Department of Labor by January 1, 2024, if seeking to substitute an existing leave or private insurance policy.
- Provide written notice to all covered employees of their rights and duties under the Act.