

Delaware Becomes Latest State to Institute Paid Family and Medical Leave

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On May 10, 2022, Delaware Governor John Carey signed into law [a bill](#) that will require private employers with ten or more employees in Delaware to provide up to 12 weeks of paid family and medical leave beginning in January 2026, one year after payroll tax deductions to fund the program begin on January 1, 2025. Delaware becomes the latest state to implement legislation that requires employers provide some form of paid family and medical leave to employees, following Maryland last month (which we reported on [here](#)).

The Healthy Delaware Families Act (the “Act”) generally tracks the federal Family and Medical Leave Act (“FMLA”) in terms of coverage, eligibility, and protections; however, some aspects of the Act diverge from the FMLA. Below is a summary of the highlights that employers should be aware of:

Covered Employers

Employers with 10 to 24 employees in Delaware during the previous 12-month period immediately preceding the start of the leave are subject to the parental leave provisions of Act. If an employer has 25 or more employees, they are subject to all provisions of the Act, including the parental leave, medical leave, family care leave, and qualifying exigency provisions. The Act also wholly exempts any business, regardless of size, that is closed in its entirety for 30 consecutive days or more per year.

Employee Eligibility

Similar to the FMLA, employees are eligible to take leave under the Act once they have been employed by their employer for at least 12 months, and if they have at least 1,250 service hours in the 12-month period immediately preceding the leave.

Covered Reasons for Leave

Under the Act, paid leave will be available for eligible employees who:

1. are caring for a child within the first year of the birth, adoption, or placement through the foster care system of the child (“parental leave”);
2. are caring for a family member with a serious health condition (defined, as it is under the FMLA, as an illness, injury, impairment or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider) (“family care”);
3. have a serious health condition that renders them unable to perform the functions of their position (“medical leave”); or
4. have a “qualifying exigency” (also defined, as it is under the FMLA, as specified exigencies that arise when an employee’s family member is a member of the Armed Forces and is called to active duty).

“Family member” under the Act includes an employee’s parent (including biological, adoptive, step and foster parent, or any individual who stood in loco parentis to the employee), child (including biological, adopted, and step child, legal ward, or a person to whom the employee stood in loco parentis), and spouse. This tracks the FMLA but is a narrower definition than used in some other states’ acts, which have extended coverage to include family members such as siblings, grandparents/children, and in-laws.

Leave Duration

The amount of leave eligible employees may take depends on the reason for the leave, though at no time will employees be entitled to more than a cumulative total of 12 weeks of leave for all covered reasons in an application year. Employees who take leave pursuant to the first reason listed above (parental leave) are eligible for a maximum of up to 12 weeks of leave in a 12-month period. Meanwhile, employees who take medical, family care, or military exigency leave pursuant to the second through fourth reasons above are eligible to take up to a maximum aggregate 6 weeks of leave for such purposes in any 24-month period.

The Act does not provide a minimum leave duration, nor does it specify the increments in which leave must be taken. It is anticipated that additional guidance will be issued as the effective date approaches.

Employees make take covered leave on a reduced or intermittent leave schedule, but only when medically necessary and supported by required documentation from the employee's or employee's family member's health care provider. Benefits received during leave taken intermittently or on a reduced schedule will be prorated. Employees who take intermittent or reduced schedule leave must also give their employer prior notice of their leave schedule to the extent practicable.

Leave Funding and Amount of Benefits

The Act authorizes funding of benefit payments through employer and employee payroll contributions. Starting January 1, 2025, covered employers must contribute a percentage of wages for each employee on a quarterly basis. For 2025 and 2026 the contribution percentages of wages will be 0.4% for medical leave benefits, 0.08% for family caregiving leave benefits, and 0.32% for parental leave benefits. The rates for 2027 and beyond will be set at a future time by Delaware's Department of Labor (the "Department"). Employers may deduct up to 50% of the total contribution required from covered employees' wages, but employers may also elect to pay all or some portion of the employee's contribution.

For employees whose weekly wages are less than \$100 per week, the benefit amount shall equal the employee's full wage. Employees who earn more than \$100 per week are entitled to a weekly benefit amount equal to 80% of their average weekly wages for the 12-month period preceding their leave application, rounded up to the nearest dollar, and subject to a cap. The maximum weekly benefit amount will be \$900 for 2026 and 2027, and shall proportionately increase each year thereafter in accordance with the U.S. Department of Labor's Consumer Price Index.

Job Restoration and Other Employee Protections under the Act

Upon a timely return from leave, an employee must be restored to the position held by the employee prior to their leave, or to a position with equivalent seniority, status, pay, benefits, and other terms and conditions of employment. Employers must also continue to maintain the health care benefits a covered employee had before the leave for the duration of the leave, and the covered employee shall continue to pay their share of the cost of those health care benefits as required before the leave.

Employees are also protected in their right to request, file or apply for, and use leave under the Act, and are protected from retaliation for enforcing their rights under the Act.

Interaction with Other Laws and Paid Time Off Benefits

If the reason(s) for an employee's leave under the Act would also qualify them for leave under the FMLA, the leave taken under the Act will run concurrently with FMLA leave.

Employers may require an employee first exhaust accrued but unused paid time off prior to using leave under the Act. Employers may also require that payments made to the employee for leave taken under this act be made concurrently with payments pursuant to a collective bargaining agreement or the employer's other leave policies. However, employees may not receive payments under the Act if it would result in the employee receiving more than 100% of their weekly wages.

Private Plan Coverage Option

The statutory text of the Act does not provide specific details about how claims for benefits shall be made by employees and how benefits will be paid out for employers contributing to the State benefits fund. However, employers may also choose to fulfill some or all of their obligations under the Act through a private plan, pending an application to and approval from the Department. Employers wishing to submit a private plan for approval by the Department must notify the Department of such intention by January 1, 2024.

For the Department to approve the private plan, it must:

- allow an eligible, covered employee to take covered leave under the plan and provide full benefits for the maximum number of weeks for leave taken under at least one of the three grounds for leave (family caregiving leave, medical leave, and parental leave);
- allow a covered individual to take the maximum aggregate amount of weeks of covered leave in a 12-month or 24-month period (depending on the type of leave taken);
- allow a covered individual to take leave for all purposes specified by the Act for the type of leave they are taking and under the same terms and conditions as set forth under the Act (*g.*, allow for covered leave to be taken on a reduced or intermittent schedule as permitted by the Act);

- provide a wage replacement rate and a weekly benefit of at the least minimum, but not more than the maximum, required amount for the duration of the covered leave;
- not impose a cost on employees that is greater than the cost would be under the State's program; and
- provide an internal review process and notice to the employees of their option to appeal a final determination of the plan.

Employer Notice Requirements

Covered employers must provide written notice of rights and protections under the Act when hiring a covered employee, and when an employee requests leave (or when an employer becomes aware that an employee's leave may qualify under the Act).

Additionally, employers must conspicuously display a poster at their place of business that contains the required information in both English and Spanish. If an employer displays a poster provided by the Department, they must include the required information in any language that is spoken by at least 5% of their workforce.

Enforcement, Penalties, and Damages

The Department shall be tasked with enforcing the Act's provisions, and may audit employers for compliance and institute a civil action for violations. Employers who violate or do not comply with the Act's requirements may be subject to civil penalties ranging between \$1,000 and \$5,000. Additionally, employers found civilly liable for violations of the Act's provisions on leave, job protection, and retaliation can be subject to damages for either lost wages and benefits or monetary losses sustained by an employee, and interest, fees, liquidated damages, and equitable relief as appropriate.

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We will continue to monitor any developments regarding the Act, and will provide updates as necessary.

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