Delaware enacts paid family and medical leave law

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In this article

Covered employers and employees | Funding | Qualifying leave | Wage-replacement benefits | Employee rights | Private plans | Coordination with other leave | Administration | Required notices | Employer actions | Related resources

The Healthy Delaware Families Act (HDFA) (2022 Ch. 301, Sen. Subst. 2 for SB 1) creates a paid family and medical leave (PFML) insurance program, with contributions starting Jan. 1, 2025. Beginning in 2026, covered employees may take up to 12 weeks of parental leave and up to six weeks of leave for medical needs, family caregiving or military qualifying exigencies. The program will provide up to 80% of average weekly wages (to a $900 weekly maximum, adjusted annually after 2027). Employers may obtain approval for equivalent private plans. The HDFA generally follows the federal Family and Medical Leave Act (FMLA) in many respects.

Covered employers and employees

Covered employers. The law applies to employers (including state and local governmental employers) with more than 25 employees working in Delaware during the "previous 12 months." When this 12-month period starts and ends is not clear, but upcoming guidance should shed light.

An employee works in Delaware if he or she primarily reports for work in the state. Employers with 10–24 employees must contribute, but only the paid parental leave portion applies. State governmental employers and school districts do not need to cover part-time and seasonal employees. The law exempts:

- The federal government
- Small employers with fewer than 10 employees in Delaware during the previous 12 months (although these employers may voluntarily opt into the program)
- Any business that closes completely for at least 30 consecutive days per year

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Covered employees. Delaware's PFML employee eligibility requirements mirror those for the federal FMLA: any employee employed at least one year who has worked at least 1,250 hours in the previous 12 months. Unlike the FMLA, the HDFA does not require employees to work within 75 miles of at least 50 other employees.

Funding

Employer and employee contributions will fund the HDFA starting on Jan. 1, 2025. Employers may (but are not required to) withhold up to 50% of the cost from employees' pay. The total contribution is 0.8% of wages, allocated as follows:

- 0.4% for medical leave
- 0.32% for parental leave
- 0.08% for family caregiving leave

Starting in 2027, the Delaware Department of Labor (DDOL) will revise contribution rates (not to exceed 1%), based on the average change in the US Department of Labor's Consumer Price Index for All Urban Consumers (CPI) for the Philadelphia-Camden-Wilmington metropolitan area. The state treasurer is providing one-time funding of almost $18 million to the Family and Medical Leave Insurance Account Fund.

A payroll tax waiver will be available when an employee's work schedule or length of employment is unlikely to meet PFML eligibility requirements.

Qualifying leave

The qualifying reasons for leave are:

- **Parental leave:** birth, adoption or foster care placement of the employee's child during the first year
- **Family caregiving:** care for a family member with a serious health condition, as defined by the FMLA
- **Medical:** an employee's serious health condition
- **Military qualifying exigency:** as defined by the FMLA

Family member. A covered family member is a child, parent or spouse, based on the traditional FMLA definitions. Under FMLA, parents and children include biological, adoptive, step or foster, or *in loco parentis* relationships. A child also includes a legal ward. A spouse includes a same- or opposite-sex spouse but not a domestic partner.

Duration. The leave amount depends on the reason. For medical, family caregiving or military qualifying exigency reasons, covered employees may take up to six weeks in any 24-month period. For parental

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leave reasons, they may take up to 12 weeks in a 12-month period. Total leave for all reasons is limited to 12 weeks in a given year. A covered employee may only take leave — except for parental leave — once in a 24-month period.

Intermittent or reduced-schedule leave is available when medically necessary for medical and family caregiving leave, if the employee provides prior notice to the extent practicable. Intermittent leave does not appear to be available for parental or military qualifying exigency leaves.

Wage-replacement benefits

PFML benefits will replace 80% of weekly wages (rounded to the nearest dollar). The minimum benefit is $100 per week, unless an employee's average weekly wage is less than this amount. For the first two years (2026 and 2027), the maximum benefit will be $900 per week. Thereafter, the maximum benefit will increase by the average change in the October CPI for the past year relative to the October 2026 CPI.

As mentioned below in the Administration section, an employer must approve or deny leave within five business days of receiving the completed request and notify DDOL within three business days after approval. The first benefit payment is due within 30 days after DDOL notification, with later payments occurring every two weeks. This payment schedule may be challenging for employers that have private plans and no biweekly payroll.

Benefits are not payable for leave periods shorter than one workday in a workweek.

Employee rights

Healthcare benefits must continue during leave at the active employee rates. When leave ends, employers must restore covered employees to the same or equivalent position held before the leave.

The law has anti-discrimination and anti-retaliation provisions. As a result, employers should ensure managers and other employees do not discipline, terminate or take any other adverse action because of an employee's use of HDFA leave.

Penalties of $1,000–$5,000 apply to each HDFA failure. Employees have a private right of action to recover lost wages and benefits (or other monetary losses if wages are not lost), plus interest. Legal liability may also include liquidated damages, reasonable attorney and expert witness fees, costs, and equitable relief. Employees may bring action for themselves and similarly situated employees.

Private plans

Employers may opt out of the insurance program if their paid leave program offers comparable terms for wage replacement, leave duration and frequency, interrelated benefits, and eligibility. A private plan can cover some components of medical, family caregiving, military qualifying exigency or parental leave, with

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the insurance program covering the rest. Private plans require DDOL approval. An employer seeking approval must notify DDOL by Dec. 31, 2023.

In addition to providing comparable value, a private plan must meet these requirements:

- Provide family caregiving, medical and/or parental leave for the required duration
- Allow leave for the maximum aggregate duration in a 12-month or a 24-month period (depending on the reason)
- Subject leaves to the same terms and conditions in the law, including leave on an intermittent or reduced-schedule basis
- Provide a wage-replacement rate and weekly benefit equal to or greater than the law requires
- Limit the employee cost to the maximum allowed under the law
- Provide an internal administrative review process and employee notice about appeal rights

Employers that self-insure their private plan must furnish a surety bond covering the state of Delaware from a surety company authorized to transact business in the state. DDOL will determine the form and amount of the surety bond. This requirement does not apply to public employers.

Coordination with other leave

Employers may require employees to use other accrued paid time off (PTO) — like vacation and sick leave — before accessing PFML benefits. Employers that don't require employees to exhaust all PTO before taking HDFA leave may apply an employee's use of accrued PTO toward the total length of HDFA leave. Employers providing written notice to employees may require coordinating HDFA benefits with other leave benefits or payments under a collective bargaining agreement (CBA) or employer policy. Employees may not receive more than 100% of wages from all sources unless required by a CBA, the employer's policy or another law. HDFA and FMLA leaves run concurrently, assuming the reason for the leave qualifies under both laws.

The HDFA does not preempt local leave laws. No Delaware city or county currently has a PMFL law or ordinance.

Administration

DDOL will issue regulations and other guidance on administrative requirements. The state Department of Insurance has authority to issue regulations for private plans. Covered employers — whether sponsoring approved private plans or contributing to the state — are responsible for administering claims.

Timing. Employees must provide 30 days' advance notice of the need for leave if known, or as soon as practicable. Employers will have five business days to approve or deny an employee's claim for benefits,

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providing reasons for any denial, and another three business days to notify DDOL about an approved claim.

Tax notice. When an employee files a claim, an employer must advise the person about these tax implications:

- PFML benefits may be subject to federal and state income taxes.
- Requirements related to federal and state estimated tax payments may apply.
- Regular tax withholding will apply to PFML benefits.

Claim substantiation. Employers must collect sufficient information to verify leave status and process a claim. For all leaves taken for a serious health condition, employers must collect a completed healthcare provider's certification that has required content. If an employer doubts a certification's validity, the employer may (at its own cost) choose a healthcare provider to supply a separate opinion, but the provider cannot be one regularly employed by the employer, its plan or DDOL.

Employers may reasonably require recertification — typically limited to once every 30 days. Employers must retain all relevant documents, including serious health condition certifications.

Appeals. Covered employees can appeal a denied claim to DDOL or a private plan, whichever is applicable, within 60 days of determination. Covered employees then have 30 days to appeal final determinations to the Family and Medical Leave Insurance Appeal Board. Regulations should provide details of the appeal process.

Required notices

Employers must provide employees at hire and on receiving a leave request a notice with this content:

- Right to PFML benefits and terms for receiving benefits
- Amount of PFML benefits
- Filing procedure for claiming benefits
- Job and benefit protections
- Anti-discrimination and anti-retaliation statement
- Right to file a complaint
- Identification of the state insurance program or the employer's approved private plan providing benefits

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Employers must also display a poster with all of this information in a conspicuous place accessible to employees. The poster must be in English, Spanish and any language spoken by at least 5% of employees (if DDOL provides a poster in that language).

Notice violations are subject to penalties described above in the Employee rights section.

Employer actions

Employers have a few years to prepare before required contributions and benefits start. Implementation guidance and education efforts are expected. Here are some steps employers can take ahead of the key deadlines in 2025 and 2026:

- Confirm whether the new law applies (and whether you are above or below the 10- or 25-employee threshold), and consider whether future workforce plans or headcount changes will affect this determination.
- Identify covered employees under the HDFA.
- Evaluate your current PTO policies and determine how they will coordinate with HDFA leave.
- Assess whether to apply for a private plan and whether to obtain insurance or self-insure.
- Make appropriate changes to your payroll system.
- Train your staff on the law's key points.
- Develop a communication plan, including required employee notices.
- Watch for guidance and other developments (for example, regulations, sample notices and forms, posters, FAQs and webinars).

Multistate employers should also consider how to coordinate Delaware's new mandate with PFML requirements in other jurisdictions. California, Connecticut, Hawaii, Massachusetts, New Jersey, New York, Puerto Rico, Rhode Island, Washington, and Washington, DC, already have programs in effect. Colorado's and Oregon's programs begin next year. Maryland adopted a PFML law in April of this year. For more detail on these other jurisdictions, see 2022 state paid family and medical leave contributions and benefits.

Related resources

Non-Mercer resource

- 2022 Ch. 301, Sen. Subst. 2 for SB 1, the Healthy Delaware Families Act (DE General Assembly, May 10, 2022)

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Mercer Law & Policy resources

- Roundup of selected state health developments, first-quarter 2022 (May 31, 2022)
- 2022 state paid family and medical leave contributions and benefits (Jan. 19, 2022)

Other Mercer resources

- Life, absence & disability
- Employers revisit time-off benefits (June 3, 2021)
- Think globally, comply locally: How employers navigate leave laws (Nov. 15, 2018)

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