Issued date: 11/10/23

Delaware Publishes Rules on Paid Family and Medical Leave

As previously reported, the Healthy Delaware Families Act ("HDFA") was signed into law on May 10, 2022. On July 11, 2023, the Delaware Department of Labor ("DDOL") released the first set of anticipated rules implementing the HDFA. While payroll contributions will not go into effect until 2025 and benefits do not begin until 2026, there are several upcoming deadlines for employers to be aware of, and decisions that need to be made prior to January 1, 2024.

Specifically, plans should be aware of the following deadlines:

- October 1, 2023 – January 1, 2024: Grandfathered paid time off plan applications available through online portal.
- January 1, 2024: Must notify the Division of Paid Leave of intent to temporarily reduce parental leave from 12 weeks to 6 weeks.
- December 1, 2024: Must notify employees of intent to temporarily reduce parental leave from 12 weeks to 6 weeks.
- September 1, 2024 – December 1, 2024: Private plan opt-out form available through online portal.

Below you will find a summary of the rules.

Background

The HDFA requires Delaware employers to provide paid family and medical leave to eligible employees. The program is funded through employer and employee contributions and will provide eligible employees with 80% of their average weekly wages earned during the 12-months prior to their application for benefits, up to a maximum benefit of $900 per week. Employees are permitted to take paid leave for:

- *Parental Leave.* Due to the birth, adoption, or placement through foster care of a child or for caring for the child during the first year after the birth, adoption, or placement of the child.
- *Family Caregiving Leave.* Caring for a family member with a serious health condition.
- *Medical Leave.* Due to their own serious medical condition.
- *Qualified exigencies.* Due to time off needed for qualified issues arising from military deployment.

Covered employers are permitted to apply to the state for an exemption from the contribution requirements when offering a private plan, provided the plan benefits are at least as generous as those required by the statute.

Employer and employee contributions are scheduled to begin January 1, 2025, with benefit payments beginning January 1, 2026.

Regulations

The DDOL released the first in what's expected to be multiple rounds of regulations clarifying various requirements under the HDFA. This first set of regulations clarifies requirements as follows:

Covered Employers and Employees

The HDFA requires that to be eligible for paid leave, employees must have been:

- Employed for at least 12 months by the employer from whom leave is being requested;
- Worked a minimum of 1,250 hours over the 12-month period prior to the request; and
- Worked at least 60% of their work hours at a worksite in Delaware (determined quarterly).

The type of paid benefits that a covered employer must provide is determined based on employer size:

- Employers with 25 or more Delaware employees must provide all paid family and medical leave benefits.
- Employers with 10-24 Delaware employees are only required to comply with the parental leave requirements.

An employer meets the employee threshold determination based on the preceding 12-month period and once this determination has been made, they are subject to the requirements of the applicable classification for a subsequent 12-month period. If the employer's classification changes, they must provide notice to employees that gain or lose paid leave benefits due to the change in classification within 30 days of the change.

Benefit Amount

The amount of an employee's benefit will be 80% of their average weekly wage calculated as the average gross weekly wages for the 52-week period prior to their claim submission. If the employee is salaried, it is determined based on the employee's gross wages divided by 52 weeks.

Employees must receive at least a minimum paid leave benefit of $100 per week but no more than $900 per week.

Duration of Leave

Employees are eligible for:

- Parental leave: 12 weeks in the applicable year.
- Medical, family caregiving, or qualified exigencies leave: 6 weeks in any 24-month period.

Employers with 10-24 Delaware employees may temporarily reduce the amount of parental leave available from 12 weeks to 6 weeks for claims submitted prior to January 1, 2031. To do so, employers must notify the Division of Paid Leave ("Division") by January 1, 2024, and must notify their employees in writing by December 1, 2024.

Payroll Contributions

If a covered employer chooses to participate in the public plan, contributions must be paid at least quarterly to the Division and will be assessed against wages paid on or after January 1, 2025 (the date that payroll contributions begin). For 2025 and 2026, the contribution rates, as a percentage of an employee's FICA wages, are as follows:

- Parental Leave: 0.32%
- Medical Leave: 0.40%
- Family Caregiving and Qualified Exigency Leave: 0.08%

Payroll contributions will begin the first day of the pay period after an employee is hired and for an employer who rises above an employee threshold, will begin the first day of the payroll period after the employer rises above the threshold.

The HDFA defaults to a 50/50 split of the contributions between the employer and employee, however an employer can choose to pay more than 50% (but not less than 50%) of the required contribution. Notice of such a variation from the default split must be given to employees and to the Division through its online portal.

No contributions are required when an employee is on HDFA leave.

Notice Requirements

When an application for leave is received, an employer, insurance carrier, or third-party administrator has 5 business days to approve or deny the application. An employer must provide the employee with written notice of the claim's approval or denial. If approved, the notice must include:

- the amount of the benefit payment;
- the party to whom the benefit payment is being made;
- the party that the payment was sent to;
- the address of the party that the payment was sent to; and
- the date that benefit payments begin and their expected end date.

If the claim is denied, the notice must explain the reason for the denial and that the employee has a right to appeal the decision including instructions on how to file an appeal.

Coordination with Other Leave Programs

The Division has deferred issuing rules concerning coordination with other leave programs (e.g., FMLA, short and long-term disability, etc.) for future rulemaking.

Private Plans

Covered employers may offer a private plan by purchasing an approved insured plan or by self-insuring the leave benefits.

If opting for an insured private plan, an employer must notify the Division through its online portal of the decision to opt out of the public plan by indicating their intention to purchase an approved insured plan.

Similarly, if an employer wishes to opt-out of the public plan and use a self-insured plan, they must notify the Division of their intent to opt-out. To maintain a self-insured plan, there must be 100 covered individuals at all times and provide the Division with a surety bond. For a self-insured plan to be approved, the benefits offered must meet the requirements of the HDFA. Note that if a self-insured plan falls below 100 covered individuals, they will be decertified at renewal and required to enroll in the public plan. Additionally, the employer will be required to pay to the fund the amount that would have been due under the public plan for the previous 12 months.

For both the insured and self-insured private plan option and for 2025 only, the opt-out form will be available on the Division's online portal from September 1, 2024 through December 1, 2024. For subsequent years, an employer can opt-out of the public plan or renew their insured or self-insured plan from October 1 through December 1 of the applicable year.

Grandfathered Plans

If a covered employer had a voluntary paid time off plan in place prior to May 10, 2022, that is considered "comparable" to the public plan, it can apply for an exemption from the public plan to continue its paid time off plan through December 31, 2029. A "comparable plan" will be deemed to exist if:

- the 3 main benefit components (benefit percentage, maximum benefit, and benefit duration) are within 10% of the equivalent public plan components;
- it provides coverage for birth, adoption, and fostering a child (and provides benefits regardless of the parent's gender or marital status); and
- employees covered under the existing plan cannot be required to contribute more to the existing plan than they would under the public plan.

In addition, an employer must submit a sworn affidavit to the Division through their online portal that the plan was in writing and had been available to all employees as of May 10, 2022. A copy of the paid time off plan must be submitted with the application as well. Any grandfathered plan cannot be altered unless the change is to improve the benefits under the plan.

Applications to grandfather an existing paid time off plan can be submitted through the Division's online portal from October 1, 2023, through January 1, 2024

Employer Action

Employers will need to determine whether they are considered a covered employer and which employee threshold applies. Employers with 10-24 covered employees will need to determine whether they intend to temporarily reduce the parental leave benefit from 12 weeks to 6 weeks and submit notice to the Division.

If a covered employer wishes to opt-out of the public plan by using an insured plan, self-insured plan, or grandfathered plan, the employer should be prepared to submit a notice of opt-out or application of grandfathering by the applicable deadlines.