



SPONSOR: Rep. Heffernan & Rep. Lambert & Sen. S. McBride
Reps. Baumbach, Neal; Sen. Walsh

HOUSE OF REPRESENTATIVES
152nd GENERAL ASSEMBLY

HOUSE BILL NO. 438

AN ACT TO AMEND TITLES 13 AND 19 OF THE DELAWARE CODE RELATING TO THE FAMILY AND
MEDICAL LEAVE INSURANCE PROGRAM.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 37, Title 19 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 3701. Definitions.

4 For purposes of this chapter:

5 (7) a. "Employer" means all those who employ employees working anywhere in this State.

6 b. "Employer" does not include any of the following:

7 3. Any business that is closed in its entirety for 30 consecutive days or more per ~~year~~ year, except
8 for a school, including a public, private, or charter school.

9 (25) "Wilful misconduct" means intentional malicious conduct or intentional conduct designed to defraud or
10 seek an unconscionable advantage, and does not include mere negligence, gross negligence, or recklessness.

11 § 3702. Eligibility for benefits; serious health condition; certification or documentation of leave.

12 (c) (1) ~~An employer~~ The Department or an approved private plan under § 3716 of this title shall collect and retain
13 information from covered individuals verifying parental leave status, serious health condition, or qualifying exigency when
14 a covered individual submits an application under this chapter. ~~An employer~~ The Department shall require that a request for
15 leave based on a serious health condition under paragraph (a)(2) or (a)(3) of this section be supported by a certification
16 issued by the health care provider of the covered individual or of the family member of the covered individual, as
17 appropriate. The covered individual shall provide, in a timely manner, a copy of the certification to the ~~employer~~
18 Department or an approved private plan under § 3716 of this title.

19 (3) a. If the ~~employer~~ Department or an approved private plan under § 3716 of this title has reason to doubt
20 the validity of a certification provided under this subsection, the ~~employer~~ Department or private plan may require, at
21 the expense of the ~~employer~~ Department or private plan, that the covered individual obtain the opinion of a second
22 health care provider designated or approved by the ~~employer~~ Department or private plan concerning any information

23 certified under this subsection. A health care provider designated under this paragraph (c)(3)a. may not be employed on
24 a regular basis by the employer, Department or private plan.

25 b. If the second opinion under paragraph (c)(3)a. of this section differs from the opinion in the original
26 certification provided by the covered individual under this subsection, the ~~employer-Department~~ or private plan
27 may require, at the expense of the ~~employer-Department~~ or private plan, that the employee obtain the opinion of a
28 third health care provider designated or approved jointly by the ~~employer-Department~~ or private plan and the
29 covered individual concerning any information certified under this subsection. The third opinion is final and
30 binding on the ~~employer-Department~~ or private plan and the covered individual.

31 (4) a. The ~~employer-Department~~ or an approved private plan under § 3716 of this title may require that the
32 covered individual obtain subsequent recertifications on a reasonable basis.

33 c. Unless otherwise required by the covered individual's health care provider, the ~~employer-Department~~
34 or private plan may not require recertification more than once during a 30-day period and, in any case, may not
35 unreasonably require recertification.

36 d. The ~~employer-Department~~ or an approved private plan under § 3716 of this title shall pay for any
37 recertification that is not covered by the covered individual's health insurance.

38 (d) The ~~employer-Department~~ or an approved private plan under § 3716 of this title ~~shall~~may require that a
39 request for leave based on a serious health condition under paragraph (a)(2) of this section of a family member be supported
40 by documentation demonstrating the nature and extent of the relationship.

41 § 3703. Duration of benefits.

42 (a) A covered individual is eligible for a maximum of 12 weeks of family and medical leave benefits in an
43 ~~application year~~a 12-month period.

44 (1) The maximum number of weeks during which parental leave benefits are payable under § 3702(a)(1) of
45 this title ~~in an application year~~ is 12 weeks~~weeks in a 12-month period~~.

46 (2) The maximum aggregate number of weeks during which medical leave and family caregiving leave
47 benefits are payable under § 3702(a)(2), (a)(3), and (a)(4) of this title ~~in an application year~~ is 6 weeks in any 24-month
48 ~~period~~two consecutive application years.

49 (e) ~~Except for parental leave benefits, and as permitted under § 3706 of this title, a covered individual is eligible~~
50 ~~for benefits under this chapter not more than once in a 24-month period.~~

51 ~~(d) (c) An employer~~ The Department must approve or deny an application for benefits under this section within 5
52 business days of receipt of a completed application that includes documentation necessary to review the claim. If the claim
53 is denied, the ~~employer~~ Department shall notify the covered individual of the reason for the denial.

54 ~~(e) (d) The employer must notify the Department, in a manner determined by the Department, within 3 business~~
55 ~~days of a claim being approved under this chapter.~~ The first payment of benefits to a covered individual must be made
56 within 30 days after the ~~employer has notified the Department of the approved~~ Department or private plan approves the
57 claim. Subsequent payments must be made every 2 weeks.

58 (g) Family leave benefits are not payable for time taken after the death of the individual for whom the employee
59 was on approved family leave.

60 § 3704. Amount of benefits.

61 ~~(c) The Department shall determine, by regulation, how benefits are to be calculated for covered individuals with~~
62 ~~more than 1 source of wages and when 12 months of wages preceding the submission of application for benefits are not~~
63 ~~available to the Department.~~ [Repealed.]

64 (d) An individual filing a new claim for family and medical leave benefits must, at the time of filing such claim,
65 disclose whether the individual owes child support obligations as required under paragraph (d)(4) of this section. If an
66 individual owes child support obligations, and the Department determines the individual is eligible for family and medical
67 leave benefits, the Department must notify the state or local child support enforcement agency enforcing such obligation
68 that the individual has been determined to be eligible for family and medical leave benefits and must deduct and withhold
69 such child support obligations from the individual's family and medical leave benefit amount.

70 (1) Any amount deducted pursuant to this section must be paid by the Department to the appropriate state or
71 local child support enforcement agency and for all purposes be treated as if it were paid to the individual as family and
72 medical leave benefits.

73 (2) This subsection applies only if the state or local child support enforcement agency makes appropriate
74 arrangements for reimbursement for the administrative costs incurred by the Department under this subsection which
75 are attributable to child support obligations being enforced by the state or local child support enforcement agency.

76 (3) Under this section, "child support obligation" is defined as including only obligations that are being
77 enforced pursuant to a plan described in § 454 of the Social Security Act [42 U.S.C. § 654] which has been approved
78 by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act [42 U.S.C. § 651 et
79 seq.].

80 (4) Under this section, “state or local child support enforcement agency” means any agency of a state or a
81 political subdivision thereof operating pursuant to a plan described in paragraph (d)(3) of this section.

82 § 3705. Contributions.

83 (a) Payroll contributions are authorized to finance the payment of benefits under this chapter. The Department
84 shall regulate the deduction, withholding, and payment of the contribution. Employers may appeal the contribution amount
85 in accordance with § 3711 of this title.

86 (c) With the exception of rates set forth in subsection (b) of this section, the Department must determine and set
87 contribution rates, statewide average weekly wage, and maximum weekly benefits no later than October 1 of each year to
88 take effect on January 1 of the following year.

89 § 3709. Coordination of benefits.

90 (a) (1) Covered leave that also qualifies as leave under the FMLA runs concurrently with leave taken under the
91 FMLA and may not be taken in addition to leave under the FMLA.

92 (2) ~~An employer may require that payment made under this chapter be made concurrently or otherwise~~
93 ~~coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective~~
94 ~~bargaining agreement or employer policy. The employer shall give employees written notice of this~~
95 ~~requirement.~~ [Repealed.]

96 (3) An employer may require the use of up to two weeks of unused accrued paid time off before accessing
97 family and medical leave benefits, and the use of accrued paid time off may count toward the total length of leave
98 provided under this chapter, if the employee is not required to exhaust all paid time off. For purposes of this paragraph
99 (a)(3) of this section, “paid time off” includes an employer’s provision of vacation and sick leave.

100 (4) A covered individual may not access family and medical leave benefits if the use of family and medical
101 leave benefits results in the covered individual receiving more than 100% of the covered individual’s weekly wages.

102 § 3711. Appeal.

103 (a) The process for review of a denial of family and medical leave benefits or an employer’s contribution amount
104 is as follows:

105 (3) An individual covered by a private plan under § 3716 of this title may request reconsideration of a denial
106 according to the private plan’s internal review process before the individual exercises the individual’s right to appeal
107 the denial of the claim to the Department under paragraph (a)(2) of this section. The private plan’s reconsideration
108 process may not require an individual to submit a reconsideration request less than 10 calendar days from the receipt of
109 the notice of denial. A private plan’s reconsideration process must extend the deadline for submitting a reconsideration

110 request when an individual establishes that circumstances beyond the individual's control prevented the filing of a
111 reconsideration request within the filing period prescribed by the private plan. If the private plan denies the request for
112 reconsideration, the private plan must give notice of the denial to the employee in writing, or by electronic means if the
113 employee consents to such communication. The notice must advise that the employee may appeal to the Department
114 and provide contact information for the Department.

115 (c) The decision of the Board with respect to an individual's claim for family and medical leave benefits is
116 final and binding on the ~~parties.~~parties, except where an appeal of the Board decision is timely appealed to the
117 Superior Court under the Administrative Procedures Act, Chapter 101 of Title 29.

118 § 3716. Private plans.

119 (a) (1) Except as provided under subsection (e) of this section, an employer may apply to the Department for
120 approval to meet the employer's obligations under this chapter through a private plan. To be approved as meeting an
121 employer's obligations under this chapter, a private plan must do all of the following:

122 b. Allow a covered individual to take, in the aggregate, the maximum number of weeks of covered leave
123 in a benefit year or 24-month period as any period required under § 3703(a) and (d) of this title.

124 (2) For a private plan to be approved as meeting an employer's obligations under this chapter, the private plan
125 must also comply with all of the following:

126 d. Submit a certification to the Department, in a form regulated by the Department, certifying that the
127 plan meets the obligations of this ~~chapter~~ chapter.

128 (h) An employer that meets its obligations under this chapter through a private plan is not required to provide
129 claim documentation to the Department unless the claim is the subject of an appeal, complaint, audit, or specific inquiry
130 from the Department.

131 § 3718. Powers of the Department.

132 (l) The Department may make and enter into any contract or agreement necessary or incidental to the performance
133 of its duties and execution of its powers concerning the review and adjudication of claims for benefits. No contract may
134 contain any provision in which a contractor derives a direct or indirect benefit from denying or otherwise influencing the
135 outcome of a claim for benefits. The Department may promulgate regulations or otherwise set minimum requirements that
136 must be included in a contract proposal.

137 § 3719. Penalties.

138 (a) An employer ~~who~~ who, as a result of wilful misconduct or gross negligence, violates or fails to comply with
139 any requirement of this chapter, including failing to file reports as prescribed by the Department, failing to make

140 contributions as required by this chapter, and failing to properly handle and remit wage deductions from employees to the
141 Department, is deemed in violation of this chapter and is subject to a civil penalty of not less than \$1,000 nor more than
142 \$5,000 for each violation.

143 § 3725. Assignment of compensation prohibited; exemption from creditors' claims.

144 Except for attachments pursuant to child support obligations in accordance with § 3704 of this title, any
145 assignment, pledge, or encumbrance of any rights to benefits that are or may become due or payable under this chapter is
146 void and exempt from all claims of creditors.

147 § 3726. Execution of judgments.

148 (a) In general. — If any person liable to pay any assessment, interest, or penalty under this title or other titles
149 subject to this chapter neglects or refuses to pay such amount after a judgment has been obtained pursuant to § 3718 of this
150 title, or otherwise, the Department may execute upon such judgment as provided herein.

151 (b) Warrants for levy and sale of property. — The Department may issue a warrant directed to the sheriff of any
152 county of this state commanding such sheriff to levy upon and sell the personal or real property of such person for the
153 payment of the amount of the judgment and the cost of executing the warrant. The sheriff shall return such warrant to the
154 Department and pay to the Department the money collected by virtue thereof within 60 days after receipt of the warrant. A
155 copy of the warrant shall be filed with the Prothonotary and noticed on the regular judgment docket. All sales of real and
156 personal property under authority of this section shall be made pursuant to the provisions of Title 10.

157 (c) Garnishment of bank accounts. — The Department may issue a notice of garnishment directed to any bank,
158 commanding said garnishee, notwithstanding the provisions of § 3502 or § 4913(b) of Title 10, to set aside, account for,
159 and pay over to the Department on account of the debt any property owed to or held for the debtor by said bank. A copy of
160 the notice of garnishment or an abstract thereof shall be filed with the Prothonotary of the Superior Court and the fact of the
161 garnishment noticed on the regular judgment docket.

162 (d) Garnishment of wages, salaries, and other amounts due from employers. — The Department may issue a notice
163 of garnishment directed to a person owing to or holding for an employer who is a judgment debtor any wages, salaries,
164 money, credits and effects, contract rights, or securities. The notice of garnishment must command the garnishee to set
165 aside, account for, and pay over to the Department on account of the judgment all property then in the garnishee's
166 possession or which may become due to the judgment debtor by the garnishee, until the judgment and costs of execution
167 are paid. A copy of the notice of garnishment or an abstract thereof must be filed with the Prothonotary of the Superior
168 Court and the fact of the garnishment noticed on the regular judgment docket. The Department shall notify the garnishee in
169 writing when the judgment and costs have been satisfied.

170 (e) The following are the duties of a garnishee and penalties for failure to garnish:

171 (1) A person receiving a notice of garnishment under subsection (c) or (d) of this section must respond to
172 the Department within 20 days after service of the notice, not counting the date of service.

173 (2) A garnishee who knowingly fails to comply with a notice of garnishment after notice and assessment
174 under subsection (d) of this section is liable for a penalty equal to the amount the garnishee was required to set
175 aside, account for, and pay over to the Department.

176 (3) Within 30 days after the date of mailing of a notice of proposed assessment of a penalty under this
177 subsection, the garnishee may file a written protest against the proposed assessment of penalty with the
178 Department in which the garnishee must set forth the grounds on which the protest is based. If a protest is filed, the
179 Director of the Division of Paid Leave, as designee of the Secretary of Labor, shall reconsider the proposed
180 assessment of penalty and, if requested by the garnishee, shall grant the garnishee an oral hearing before the Board
181 under § 3711 of this title. The Board's decision is final and not subject to further appeal.

182 (4) A penalty under paragraph (e)(2) of this section becomes final 30 days after the mailing of the notice
183 of proposed assessment of the penalty, except for those amounts for which the garnishee has filed a timely written
184 protest with the Department under paragraph (e)(3) of this section.

185 (f) Notwithstanding § 3502 of Title 10, the legal or equitable property, wages, salaries, deposits, or moneys in
186 banks, savings institutions, or loan associations, or other property or income of an employer owing tax assessments to the
187 Department is not exempt from execution or attachment process issued on, or from collection of, a judgment obtained under
188 § 3718 of this title.

189 Section 2. Amend Title 13 of the Delaware Code by making deletions as shown by strike through and insertions as
190 shown by underline as follows:

191 § 513. Judgment; order of support; other terms.

192 (b) (5) For purposes of Chapters 4, 5 and 6 of this title, "income" is defined as:

193 a. Any periodic form of payment due to an individual, regardless of source, including, but not limited to,
194 wages, salary, commission, vacation pay, severance pay, bonuses, compensation as an independent contractor,
195 workers' compensation, disability, sick pay, SUB benefits, medical benefits, unemployment compensation,
196 railroad retirement, pensions, annuity and retirement ~~benefits; or~~ benefits, medical and family leave benefits as
197 defined under § 3701 of Title 19; or

198 (7) Any attachment or execution to enforce an order for child support, medical support, or unallocated
199 alimony and child support entered under this title shall not be subject to the exemptions or limitations set forth in §

200 3502 or § 4913 of Title 10 or § 5503 of Title 29. Said attachment for support shall also have priority over any other
201 attachment, except an attachment for federal tax liens, regardless of whether such other attachment was perfected prior
202 to the support attachment. The support and medical support attachment shall be subject to the limitations set forth in §
203 303(b) of the Consumer Credit Protection Act (15 U.S.C. § 1673(b)); provided, however, that an attachment of
204 unemployment compensation or medical and family leave benefits shall not exceed 50 percent of the weekly payment
205 thereof.

206 § 2208. State Directory of New Hires.

207 (e) *Uses of new hire information.* — The State Directory of New Hires shall make the specified information
208 available to the following entities for the purposes described below.

209 (3) (3) The State Directory of New Hires shall grant access to information provided by employers pursuant to
210 § 1156A of Title 30 to the State Division of Unemployment Insurance for the purpose of administering the State's
211 unemployment insurance services ~~program and program~~, the State Division of Industrial Affairs for the purpose of
212 administering the Workers' Compensation ~~Program~~, and the State Division of Paid Leave for the purpose of
213 administering the Paid Family and Medical Leave Program.

SYNOPSIS

This Act makes changes to the Paid Family and Medical Leave Program. It removes the employer as the party responsible for making eligibility determinations and claims decisions and instead reallocates this responsibility to the Department of Labor and gives the Department authority to enter into contracts with other entities to review and adjudicate claims for benefits.

This Act makes other changes throughout Chapter 37 of Title 19 concerning eligibility criteria and requirements for the Paid Family and Medical Leave Program. It clarifies that schools are not exempt from being considered employers; clarifies that family leave benefits are not payable for time taken after the death of an individual for whom an employee is on approved family leave; removes the ability of employers with fewer than 25 employees to elect to provide reduced parental leave; removes a provision that results in the aggregation and potential capping of benefits for employees who work multiple jobs with the potential for employees to pay more in contributions and receive less in benefits than they would otherwise be due; requires the Department to set contribution rates, statewide average weekly wages, and maximum benefits; removes a provision authorizing employers to require that payment be made concurrently or otherwise coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective bargaining agreement or employer policy; removes a provision allowing employers to require employees to use accrued paid time off before accessing family and medical leave benefits and count that accrued paid time off toward the total length of leave allowed under Chapter 37 of Title 19; authorizes an employee an option to use a private review process of a private plan's denial of benefits prior to appealing to the Department; clarifies that denials of claims are subject to the appeal provisions of the Administrative Procedures Act; and clarifies that employers who violate the requirements of Chapter 37 of Title 19 are subject to a penalty only where the violation is due to wilful misconduct or gross negligence. This Act makes changes to ensure that child support obligations are fulfilled and benefit checks account appropriately for child support deductions and to allow the Department to make garnishments to enforce judgments obtained under this chapter.

This Act also updates relevant sections of Title 13 to allow for child support deductions of PFMLA benefits as appropriate.

This Act also makes technical corrections to conform to the standards of the Delaware Legislative Drafting Manual.