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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 2
FOR
SENATE BILL NO. 1

AN ACT TO AMEND TITLE 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 (Three-fifths of all members elected to each house thereof concurring therein):

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

3 Part V. Family and Medical Leave Insurance Program.

4 Chapter 37. Family and Medical Leave Insurance Program.

5 § 3701. Definitions.

6 For purposes of this chapter:

7 (1) “Application year” means the 12-month period as defined in the FMLA.

8 (2) “Child” means “son or daughter” as defined in the FMLA.

9 (3) “Covered individual” means an individual who meets all of the following:

10 a. Has been employed for at least 12 months by the employer with respect to whom leave is requested.

11 b. Has been employed for at least 1,250 hours of service with the employer during the previous 12-month
12 period. For purposes of determining whether an individual meets the service hours requirement under this
13 paragraph (3)b., the legal standards established under the FMLA apply.

14 c. The administrative requirements under this chapter.

15 d. Has submitted an application under this chapter.

16 (4) “Covered leave” means leave provided under this chapter.

17 (5) “Department” means the Department of Labor.

18 (6)a. “Employee” means an individual employed by an employer. For the purposes of this chapter, individuals
19 primarily reporting for work at a worksite in this State are employees unless otherwise excluded. Individuals primarily
20 reporting for work at a worksite outside of this State are not considered employees under this chapter unless the
21 employer elects to classify them as such. Employers may reclassify an employee as primarily reporting for work at a
22 worksite in another state for the purposes of this chapter through the duration of that individual’s tenure at the out-of-
23 state worksite.

24 b. “Employee” does not include an individual covered under § 5903(17)a. of Title 29, an individual
25 employed by entities in Title 14 in a position that would be covered under § 5903(17)a. of Title 29, or an
26 individual in an equivalent position with an entity covered by State employee benefits.

27 (7)a. “Employer” means all those who employ employees working anywhere in this State.

28 1. Employers with 10 to 24 employees during the previous 12 months shall be subject to only the
29 parental leave provisions of this chapter. For purposes of this paragraph (7)a.1., “employees” includes those
30 who meet the requirements of a covered individual under § 3701(3)a. and (3)b. of this title or are reasonably
31 expected to meet the requirements of a covered individual under § 3701(3)a. and b. of this title during the
32 previous 12 months.

33 2. Employers with 25 or more employees during the previous 12 months shall be subject to all
34 parental, family caregiving, and medical leave provisions of this chapter. For purposes of this paragraph
35 (7)a.2., “employees” includes those who meet the requirements of a covered individual under § 3701(3)a. and
36 (3)b. of this title or are reasonably expected to meet the requirements of a covered individual under §
37 3701(3)a. and b. of this title during the previous 12 months.

38 b. “Employer” does not include any of the following:

39 1. Anyone who employs less than 10 employees in this State during the previous 12 months.

40 2. The federal government.

41 (8) “Family and medical leave benefits” means benefits provided under this chapter.

42 (9) “Family caregiving leave” includes leave under § 3702(a)(2) and (a)(4) of this title.

43 (10) “Family caregiving leave benefits” means benefits paid under § 3704 of this title and provided under §
44 3702(a) of this title to a covered individual while the covered individual is on family leave.

45 (11) “Family member” means all of the following:

46 a. A parent, as defined under the FMLA.

47 b. A child.

48 c. A spouse, as defined under the FMLA.

49 (12) “FMLA” means the Family and Medical Leave Act, 29 U.S.C. Chapter 28.

50 (13) “Fund” means the Family and Medical Leave Insurance Account Fund created under this chapter.

51 (14) “Health care provider” means as defined under the FMLA.

52 (15) “Medical leave” includes leave under § 3702(a)(3) of this title.

53 (16) “Medical leave benefits” means benefits paid under § 3704 of this title and provided under § 3702(a) of
54 this title to a covered individual while the covered individual is on medical leave.

55 (17) “Parental leave” includes leave under § 3702(a)(1) of this title.

56 (18) “Parental leave benefits” means benefits paid under § 3704 of this title and provided under § 3702(a) of
57 this title to a covered individual while the covered individual is on parental leave.

58 (19) “Qualifying exigency” means as defined under the FMLA.

59 (20)a. “Retaliatory personnel action” means an adverse action against an employee for the exercise of, or good
60 faith attempt to exercise, a right guaranteed under this chapter, including any threat, discharge, suspension, demotion,
61 or reduction of hours, or report or threat to report an employee’s suspected citizenship or immigration status or the
62 suspected citizenship or immigration status of a family member of the employee to a federal, state, or local agency.

63 b. “Retaliatory personnel action” includes interference with or punishment for participating or assisting,
64 in any manner, in an investigation, proceeding, or hearing under this chapter.

65 (21) “Secretary” means the Secretary of the Department.

66 (22) “Serious health condition” means as defined under the FMLA.

67 (23) “Small business” means all of the following:

68 a. For purposes of parental leave, all those that employ 9 or less employees working anywhere in this
69 State.

70 b. For purposes of family caregiving leave and medical leave, all those that employ 24 or less employees
71 working anywhere in this State.

72 (24) “Wages” means remuneration for employment as determined for purposes of old-age, survivors, and
73 disability insurance for employees and employers under the Federal Insurance Contribution Act, 26 U.S.C. Chapter 21,
74 § 3702. Eligibility for benefits; serious health condition; certification or documentation of leave.

75 (a) Beginning 1 year after the start of contributions under § 3705 of this title, and subject to subsection (c) of this
76 section, family and medical leave benefits are payable to a covered individual who meets one of the following:

77 (1) Because of a birth, adoption, or placement through foster care of a child, is caring for the child during the
78 first year after the birth, adoption, or placement of the child.

79 (2) Is caring for a family member with a serious health condition.

80 (3) Has a serious health condition that makes the covered individual unable to perform the functions of the
81 covered individual's position.

82 (4) Has a qualifying exigency.

83 (b) In applying and construing serious health condition, consideration must be given to the application and
84 construction given to serious health condition under the FMLA.

85 (c)(1) An employer or an approved private plan under § 3716 of this title shall collect and retain information from
86 covered individuals verifying parental leave status, serious health condition, or qualifying exigency when a covered
87 individual submits an application under this chapter. An employer shall require that a request for leave based on a serious
88 health condition under paragraph (a)(2) or (a)(3) of this section be supported by a certification issued by the health care
89 provider of the covered individual or of the family member of the covered individual, as appropriate. The covered
90 individual shall provide, in a timely manner, a copy of the certification to the employer or an approved private plan under §
91 3716 of this title.

92 (2) A certification required under paragraph (c)(1) of this section is sufficient if it includes all of the
93 following:

94 a. The date on which the serious health condition commenced.

95 b. The probable duration of the condition.

96 c. The appropriate medical facts within the knowledge of the health care provider regarding the condition.

97 d. A statement of the following, as appropriate:

98 1. For purposes of leave under paragraph (a)(2) of this section, a statement that the covered
99 individual is needed to care for the family member who has a serious health condition and an estimate of the
100 time that the covered individual needs to care for the family member.

101 2. For purposes of leave under paragraph (a)(3) of this section, a statement that the covered
102 individual is unable to perform the functions of the covered individual's position.

103 e. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for
104 planned medical treatment, the dates on which the medical treatment is expected to be given and the duration of
105 the medical treatment.

106 f. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for
107 purposes of leave under paragraph (a)(2) of this section, a statement that the covered individual's intermittent
108 leave or leave on a reduced leave schedule is necessary for the care of the family member who has the serious
109 health condition, or will assist in the family member's recovery, and the expected duration and schedule of the
110 intermittent leave or reduced leave schedule.

111 g. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for
112 purposes of leave under paragraph (a)(3) of this section, a statement of the medical necessity of the intermittent
113 leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave
114 schedule.

115 (3)a. If the employer or an approved private plan under § 3716 of this title has reason to doubt the validity of a
116 certification provided under this subsection, the employer or private plan may require, at the expense of the employer
117 or private plan, that the covered individual obtain the opinion of a second health care provider designated or approved
118 by the employer or private plan concerning any information certified under this subsection. A health care provider
119 designated under this paragraph (c)(3)a. may not be employed on a regular basis by the employer, Department or
120 private plan.

121 b. If the second opinion under paragraph (c)(3)a. of this section differs from the opinion in the original
122 certification provided by the covered individual under this subsection, the employer or private plan may require, at
123 the expense of the employer or private plan, that the employee obtain the opinion of a third health care provider
124 designated or approved jointly by the employer or private plan and the covered individual concerning any
125 information certified under this subsection. The third opinion is final and binding on the employer or private plan
126 and the covered individual.

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

129 b. The standards for determining what constitutes a reasonable basis for recertification may be governed
130 by a collective bargaining agreement between the employer or private plan and a labor organization which is the
131 collective bargaining representative of the unit of which the covered individual is a part if such a collective
132 bargaining agreement is in effect.

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

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

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

141 § 3703. Duration of benefits.

142 (a) A covered individual is eligible for a maximum of 12 weeks of family and medical leave benefits in an
143 application year.

144 (1) The maximum number of weeks during which parental leave benefits are payable under § 3702(a)(1) of
145 this title in an application year is 12 weeks.

146 (2) The maximum aggregate number of weeks during which medical leave and family caregiving leave
147 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
148 period.

149 (b) If 2 parents are entitled to leave under § 3702(a)(1), (a)(2), or (a)(4) of this title and are employed by the same
150 employer, the aggregate number of weeks of leave to which both may be entitled may be limited by the employer to 12
151 weeks during any 12-month period. The Department may adopt regulations limiting aggregate family caregiving leave
152 claimed by multiple family members for the same qualifying event under § 3702(a) of this title.

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

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

158 (e) The employer must notify the Department, in a manner determined by the Department, within 3 business days
159 of a claim being approved under this chapter. The first payment of benefits to a covered individual must be made within 30
160 days after the employer has notified the Department of the approved claim. Subsequent payments must be made every 2
161 weeks.

162 (f) An employer with less than 25 employees may elect, with notice to the Department and employees, for each
163 employee to exercise not less than half of the employee's parental leave for 5 years from the start of benefits under § 3702
164 of this title.

165 § 3704. Amount of benefits.

166 (a) The amount of family and medical leave benefits is to be determined as follows:

167 (1) The weekly benefit must be 80% of the covered individual's average weekly wages rounded up to the

168 nearest even \$1.00 increment during the 12 months preceding submission of the application.

169 (2) The minimum weekly benefit may not be less than \$100 a week, except that if the covered individual's

170 average weekly wage is less than \$100 a week, the weekly benefit must be the covered individual's full wage.

171 (3) The maximum weekly benefit in 2026 and 2027 must be \$900. In each year after 2027, the maximum

172 weekly benefit must increase in proportion to the annual average increase, if any, in the Consumer Price Index for All

173 Urban Consumers, Philadelphia-Camden-Wilmington Metropolitan area that is published by the Bureau of Labor

174 Statistics of the United States Department of Labor. In each year after 2027, the period of change must be calculated

175 from October 2026 to the October before the start of the calendar year. When the Department determines a maximum

176 weekly benefit amount using the Consumer Price Index under this paragraph (a)(3), the amount must be rounded to the

177 nearest even \$5.00 increment as determined in the discretion of the Secretary.

178 (b) Family and medical leave benefits are not payable for less than 1 work day of covered leave taken in 1 work

179 week.

180 (c) The Department shall determine, by regulation, how benefits are to be calculated for covered individuals with

181 more than 1 source of wages and when 12 months of wages preceding the submission of application for benefits are not

182 available to the Department.

183 § 3705. Contributions.

184 (a) Payroll contributions are authorized to finance the payment of benefits under this chapter. The Department

185 shall regulate the deduction, withholding, and payment of the contribution.

186 (b) Beginning on January 1, 2025, for each employee, an employer shall quarterly, or more frequently as regulated

187 by the Department, remit to the Fund contributions in the form and manner determined by the Department.

188 (1) The contribution rate for medical leave benefits is as follows:

189 a. For 2025 and 2026, the contribution rate for medical leave benefits as a percentage of wages is 0.4%.

190 b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for medical

191 leave benefits as a percentage of wages based on sound actuarial principles. The Department may not set the

192 contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of the

193 medical leave benefits paid during the immediately preceding calendar year plus an amount equal to 125% of the

194 cost of administration of the payment of those benefits during the immediately preceding calendar year, less the

195 amount of net assets remaining in the Fund as of December 31 of the immediately preceding calendar year.

196 (2) The contribution rate for family caregiving leave benefits is as follows:

197 a. For 2025 and 2026, the contribution rate for family caregiving leave benefits as a percentage of wages
198 is 0.08%.

199 b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for family
200 caregiving leave benefits based as a percentage of wages on sound actuarial principles. The Department may not
201 set the contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of
202 the family caregiving leave benefits paid during the immediately preceding calendar year plus an amount equal to
203 125% of the cost of administration of the payment of those benefits during the immediately preceding calendar
204 year, less the amount of net assets remaining in the Fund as of December 31 of the immediately preceding
205 calendar year.

206 (3) The contribution rate for parental leave benefits is as follows:

207 a. For 2025 and 2026, the contribution rate for parental leave benefits as a percentage of wages is 0.32%.

208 b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for parental
209 leave benefits as a percentage of wages based on sound actuarial principles. The Department may not set the
210 contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of the
211 parental leave benefits paid during the immediately preceding calendar year plus an amount equal to 125% of the
212 cost of administration of the payment of those benefits during the immediately preceding calendar year, less the
213 amount of net assets remaining in the Fund as of December 31 of the immediately preceding calendar year.

214 (c) Limitation on benefits and contribution rates; evidentiary standard.

215 (1) General. Notwithstanding a provision of this chapter to the contrary, this subsection controls with respect
216 to benefits available under, and contributions required by, this chapter.

217 (2) Contribution rate; limitation.

218 a. For purposes of this subsection, “contribution rate” means the sum of the contribution rate for medical,
219 family caregiving, and parental leave benefits.

220 b. If, after using the actuarial principles under § 3705(b) of this title, the Department determines that the
221 contribution rate would exceed 1.00%, paragraph (c)(3) of this section applies.

222 (3) Contribution redetermination; benefits reduction. If, under paragraph (c)(2)b. of this section, the
223 Department determines that the contribution rate effective as of the first day beginning on the next calendar year would
224 exceed 1.00%, effective as of and for such calendar year the Department shall reduce the percentage of average weekly

225 wages for employees from 80% to the lowest percentage of average weekly wages for employees as necessary to
226 compute a contribution rate that does not exceed 1.00%.

227 (4) *Preservation of Fund balance.* Notwithstanding anything in this chapter to the contrary, after using the
228 actuarial principles under § 3705(b) of this title and considering other information deemed appropriate under the
229 circumstances by the Secretary, the Secretary may at any time reduce the percentage of average weekly wages for
230 employees to the lowest percentage of average weekly wages for employees as necessary to attempt to prevent the
231 projected balance of the Fund during the ensuing 12 month period from falling below a specific balance or other
232 actuarially sound measure adopted by the Department.

233 (5) *Evidentiary standard.* An allegation of abuse in the exercise of the discretion authorized by this section
234 must be established by clear and convincing evidence of actual abuse of discretion in the court then having primary
235 jurisdiction.

236 (d) From the wages of an employee for whom a contribution is required under subsection (b)(1) of this section, an
237 employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect
238 to pay all or any portion of the employee's share of the contribution listed in subsection (b)(1) of this section.

239 (e) From the wages of an employee for whom a contribution is required under subsection (b)(2) of this section, an
240 employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect
241 to pay all or any portion of the employee's share of the contribution listed in subsection (b)(2) of this section.

242 (f) From the wages of an employee for whom a contribution is required under subsection (b)(3) of this section, an
243 employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect
244 to pay all or any portion of the employee's share of the contribution listed in subsection (b)(3) of this section.

245 (g) An employer's deduction from an employee's wages under this section may only be made concurrent with, and
246 proportionate to, the liability incurred by the employer and the payment of wages to the employee. The employer is liable
247 for the contribution at the time that wages are paid and shall remit the total contribution required under subsection (b) of
248 this section to the Fund. If the employer fails to deduct wages of an employee when the wages are paid, the employer
249 remains liable for the full amount of the contribution, including that amount not deducted from an employee's wages.

250 (h) A contribution that remains unpaid on the date it is due and payable, as determined by the Department, accrues
251 interest, at a rate determined by the Department by regulation, from and after the due date until payment plus the accrued
252 interest is received by the Fund. Interest collected under this section must be paid into the Fund.

253 (i)(1) An employer with an approved private plan under § 3716 of this title for medical leave benefits may not be
254 required to remit the contributions required under subsection (b)(1) of this section.

255 (2) An employer with an approved private plan under § 3716 of this title for family caregiving leave benefits
256 may not be required to remit the contributions required under subsection (b)(2) of this section.

257 (3) An employer with an approved private plan under § 3716 of this title for parental leave benefits may not
258 be required to remit the contributions required under subsection(b)(3) of this section.

259 (j) The Department may require from an employer a sworn or unsworn report with respect to employees of the
260 employer which the Department deems necessary for the effective administration of this chapter. Information provided to
261 the Department in the report must be held confidential and must not be published or be open to public inspection, other than
262 to employees of the Department, in a manner that reveals an employee's or employer's identity. However, an employer or
263 employer's legal representative must be supplied with information from the report for purposes related to this chapter, and
264 an employee or employee's legal representative must be supplied with information from the report that relates only to the
265 employee for purposes related to this chapter.

266 (k) An employee and employer may opt to file a waiver of the payroll contributions required under this section
267 when an employee's work schedule or length of employment with the employer is not expected to meet the requirements
268 for eligibility for family and medical leave benefits.

269 (1) The employer shall provide notice to the employee that employee's work schedule or length of
270 employment with the employer is not expected to meet the requirements for eligibility for family and medical leave
271 benefits.

272 (2) The employee shall sign, and the employer shall submit to the Department, a form waiving the payroll
273 contributions required under this section because employee's work schedule or length of employment with the
274 employer is not expected to meet the requirements for eligibility for family and medical leave benefits.

275 (3) If, after an employee signs a waiver under paragraph (k)(2) of this section, the employee becomes eligible
276 for family and medical leave benefits, the employee shall sign, and the employer shall submit to the Department, a
277 form revoking the waiver under paragraph (k)(2) of this section. Deductions from wages may not begin until a waiver
278 is revoked.

279 (4) The Department shall adopt a form for the waiver under paragraph (k)(2) of this section and the revocation
280 of the waiver under paragraph (k)(3) of this section.

281 § 3706. Reduced leave schedule.

282 (a) A covered individual may take covered leave on an intermittent or reduced leave schedule in which all of the
283 leave authorized under this chapter is not taken sequentially. Intermittent or reduced leave may be taken only when

284 medically necessary and supported by documentation as required by the certification requirements under § 3702 of this
285 title. Family and medical leave benefits for intermittent or reduced leave schedules must be prorated.

286 (b) The covered individual shall provide the employer with prior notice of the schedule on which the covered
287 individual will take the covered leave, to the extent practicable. Covered leave taken under this section may not result in a
288 reduction of the total amount of leave to which an employee is entitled beyond the amount of leave actually taken.

289 (c) Nothing in this section is to be construed to entitle a covered individual to more leave than required under §
290 3703 of this this title.

291 § 3707. Leave and employment protection.

292 (a) A covered individual who exercises the covered individual's right to family and medical leave benefits shall,
293 on the expiration of the covered leave, be entitled to be restored by the employer to the position held by the covered
294 individual when the covered leave commenced, or to a position with equivalent seniority, status, employment benefits, pay,
295 and other terms and conditions of employment, including fringe benefits and service credits, which the covered individual
296 had been entitled to at the commencement of the covered leave.

297 (b) During covered leave, the employer shall maintain any health care benefits the covered individual had before
298 taking the leave for the duration of the leave as if the covered individual had continued in employment continuously from
299 the date the covered individual commenced the leave until the date the family and medical leave benefits terminate. The
300 covered individual shall continue to pay the covered individual's share of the cost of health care benefits as required before
301 the commencement of the leave.

302 (c) An employer who violates this section or § 3708 of this title is liable to an employee affected for all of the
303 following:

304 (1) Damages equal to all of the following:

305 a. The amount of any of the following:

306 1. Any wages or employment benefits denied or lost to the employee by reason of the violation.

307 2. In an action in which wages or employment benefits have not been denied or lost to the employee,
308 any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of
309 providing care, up to a sum equal to 12 weeks of wages or employment benefits for the employee.

310 b. Interest on the amount under paragraph (c)(1)a. of this section, calculated at the legal rate.

311 c. An additional amount as liquidated damages equal to the sum of the amount described in paragraph
312 (c)(1)a. of this section and the interest under paragraph (c)(1)b. of this section. If an employer who has violated
313 this section or § 3708 of this title proves to the satisfaction of the court that the act or omission that violated this

314 section or § 3708 of this title was in good faith and that the employer had reasonable grounds for believing that the
315 act or omission was not a violation of this section or § 3708 of this title, the court may reduce the amount of the
316 liability to the amount and interest determined under paragraph(c)(1)a. and (c)(1)b. of this section, respectively.

317 (2) For equitable relief as may be appropriate, including employment, reinstatement, and promotion.

318 (d) An action under subsection (c) of this section may be maintained against an employer in a court of competent
319 jurisdiction in this State by any 1 or more employees for and on behalf of the employees or the employees and other
320 employees similarly situated.

321 (e)(1) The court in an action under subsection (c) of this section may, in addition to any judgment awarded to the
322 plaintiff, award reasonable attorney fees, reasonable expert witness fees, and other costs of the action to be paid by the
323 defendant.

324 (2) The court in an action under subsection (c) of this section shall award reasonable attorney fees to a
325 defendant if the court finds the action was brought in bad faith.

326 (f) Except as provided under subsection (g) of this section, an action may be brought for a violation of this section
327 or § 3708 of this title not later than 2 years after the date of the last event constituting the alleged violation for which the
328 action is brought.

329 (g) In an action brought for a wilful violation of this section or § 3708 of this title, the action may be brought not
330 later than 3 years after the date of the last event constituting the alleged violation for which the action is brought.

331 § 3708. Retaliatory personnel actions prohibited.

332 (a) It is unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the
333 attempt to exercise, any right protected under this chapter.

334 (b) An employer, temporary help company, employment agency, employee organization, or other person may not
335 take a retaliatory personnel action or otherwise discriminate against an individual because the individual exercised rights
336 protected under this chapter.

337 (c) Rights protected under this chapter include the following:

338 (1) The right to request, file for, apply for, or use family and medical leave benefits or covered leave.

339 (2) The right to communicate to the employer or any other person or entity an intent to file a claim, a
340 complaint with the Department or courts, or an appeal, or testify or prepare to testify or assist in any investigation,
341 hearing, or proceeding under this chapter, at any time, including during the period in which the individual receives
342 family and medical leave benefits under this chapter.

343 (3) The right to inform a person about an employer's alleged violation of this chapter.

344 (4) The right to inform an individual of the individual’s rights under this chapter.

345 (d) It is unlawful for an employer’s absence control policy to count covered leave taken under this chapter as an
346 absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.

347 (e) Protections of this section apply to an individual who mistakenly but in good faith alleges violations of this
348 chapter.

349 (f) This section is to be enforced as provided in § 3707(c) through (g) of this title.

350 (g) This section applies only to an employee who has been employed by the employer for at least 90 days.

351 § 3709. Coordination of benefits.

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

354 (2) An employer may require that payment made under this chapter be made concurrently or otherwise
355 coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective
356 bargaining agreement or employer policy. The employer shall give employees written notice of this requirement.

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

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

363 (b)(1) This chapter does not diminish an employer’s obligation to comply with any of the following that provide
364 more generous leave:

365 a. A collective bargaining agreement.

366 b. An employer policy.

367 c. Any other law.

368 (2) An individual’s right to covered leave may not be diminished by a collective bargaining agreement entered
369 into or renewed, or an employer policy adopted or retained, after [the effective date of this Act].

370 (3) An agreement by an individual to waive the individual’s rights under this chapter is void as against public
371 policy.

372 § 3710. Notice.

373 (a) An employer shall provide written notice to each employee that includes all of the following:

374 (1) The employee's right to family and medical leave benefits under this chapter and the terms under which it
375 may be used.

376 (2) The amount of family and medical leave benefits.

377 (3) The procedure for filing a claim for family and medical leave benefits.

378 (4) The right to job protection and benefits continuation under § 3707 of this title.

379 (5) That discrimination and retaliatory personnel actions against the employee for requesting, applying for, or
380 using family and medical leave benefits is prohibited under § 3708 of this title.

381 (6) That the employee has a right to file a complaint for violations of this chapter.

382 (7) Whether family and medical leave benefits are available to the employee through the State or an approved
383 private plan under § 3716 of this title.

384 (b) An employer shall provide the notice required under subsection (a) of this section as follows:

385 (1) On hiring of the employee.

386 (2) When the employee requests covered leave or when the employer acquires knowledge that an employee's
387 leave may be for a qualifying event under § 3702(a) of this title.

388 (c) An employer shall display and maintain a poster in a conspicuous place accessible to employees at the
389 employer's place of business that contains the information required under subsection (a) of this section in English, Spanish,
390 and any language that is the first language spoken by at least 5% of the employer's workforce, if the poster has been
391 provided by the Department.

392 (d) The Department may adopt regulations to establish additional requirements concerning the means by which
393 employers shall provide notice of this chapter.

394 (e) An employee shall provide notice of the employee's intention to take covered leave to the employee's
395 employer 30 days in advance, if known, or as soon as practicable.

396 § 3711. Appeal.

397 (a) The process for review of a denial of family and medical leave benefits is as follows:

398 (1) On a determination of an individual's claim for family and medical leave benefits under this chapter by the
399 employer, the individual may request review of the determination by the Department within 60 days of the issuance of
400 the determination. The Department shall review the denial and issue a determination to the individual in a time and
401 manner determined by the Department.

402 (2) On determination by the Department under paragraph (a)(1) of this subsection or final determination by a
403 private plan under § 3716 of this title, an individual may appeal the determination to the Family and Medical Leave

404 Insurance Appeal Board established under subsection (b) of this section within 30 days of the issuance of the
405 determination.

406 (b)(1) There is established a Family and Medical Leave Insurance Appeal Board (“Board”).

407 (2) The Board consists of 3 members, appointed by the Governor for a term of 6 years.

408 (3) The Governor shall fill a vacancy on the Board during a member’s term for the unexpired portion of the
409 term.

410 (4) The Governor may, at any time, after notice and hearing, remove any Board member for gross
411 inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office. For purposes of this section, a
412 member who is absent without adequate reason for 3 consecutive meetings or fails to attend at least half of all regular
413 meetings during any calendar year is deemed to be in neglect of duty.

414 (5) Two members of the Board constitute a quorum. A vacancy does not impair the right of the remaining
415 Board members to exercise all of the powers of the Board.

416 (6) The Governor shall designate 1 member of the Board as the Chair. If the term of the Chair expires or if the
417 Chair becomes vacant for any cause, the Governor shall designate another member as Chair.

418 (7)a. The Chair of the Board must be paid \$225 for each meeting attended, not to exceed 80 meetings each
419 year.

420 b. Each of the other members of the Board is to be paid \$175 for each meeting attended, not to exceed 80
421 meetings each year.

422 c. The members of the Board shall devote to the duties of the members’ office the time necessary for the
423 satisfactory execution of the office.

424 (c) The decision of the Board with respect to an individual’s claim for family and medical leave benefits is final
425 and binding on the parties.

426 (d) The Department shall implement procedures to ensure confidentiality of all information related to a claim filed
427 or an appeal taken, to the maximum extent permitted by applicable laws.

428 (e) The Board shall conduct hearings under the Administrative Procedures Act, Chapter 101 of Title 29, except
429 that the Board’s hearings are exempt from the public meeting requirements of Chapter 100 of Title 29 to protect
430 confidential health and privacy information.

431 (f) The Board may adopt regulations to implement this section.

432 § 3712. Erroneous payments; disqualification for benefits.

433 (a) A covered individual is disqualified from family and medical leave benefits for 3 years if the covered
434 individual is determined by the Department to have wilfully made a false statement or misrepresentation regarding a
435 material fact, or wilfully failed to report a material fact, to obtain benefits under this chapter.

436 (b) If family and medical leave benefits are paid erroneously or as a result of wilful misrepresentation, or if a claim
437 for family and medical leave benefits is rejected after benefits are paid, the Department may seek repayment from the
438 recipient of benefits, with interest in an amount to be determined by the Department, consistent with § 3718 of this title. If
439 benefits are paid due to wilful misrepresentation, the Department may seek an additional penalty of up to 50% of the
440 overpayment and a penalty as permitted by § 3719 of this title.

441 (c) When the Department determines that an individual obtained an overpayment by fraud, in addition to any
442 disqualification under subsection (a) of this section, the individual is disqualified from receiving family and medical leave
443 benefits until the Department determines that all of the following have occurred:

444 (1) The total amount of the fraud overpayment, with interest, has been repaid in full.

445 (2) Any monetary penalty under this section has been paid in full.

446 § 3713. Family and Medical Leave Insurance Program.

447 (a)(1) By January 1, 2025, the Department shall establish and administer a family and medical leave insurance
448 program.

449 (2) By not later than the date specified in § 3702(a) of this title, the Department shall pay family and medical
450 leave benefits as specified under this chapter.

451 (b) The Department shall establish, and make available to employers, reasonable procedures and forms for filing
452 claims for benefits under this chapter and shall specify the supporting documentation necessary to support a claim for
453 benefits, including any documentation required from a health care provider for proof of a serious health condition.

454 (c) The Department shall use information sharing and integration technology to facilitate the disclosure of relevant
455 information or records so long as a covered individual consents to the disclosure as required under state law.

456 (d) Information contained in the files and records pertaining to a covered individual under this chapter is
457 confidential and not open to public inspection, other than to public employees in the performance of their official duties.
458 However, the covered individual, or an authorized representative of the covered individual, may review the records or
459 receive specific information from the records on the presentation of the covered individual's signed authorization.

460 § 3714. Federal and state income tax.

461 The employer or an approved private plan under § 3716 of this title shall advise a covered individual filing a new
462 claim for family and medical leave benefits, at the time of filing the claim, of all of the following:

463 (1) Family and medical leave benefits may be subject to federal and state income taxes.

464 (2) Requirements exist pertaining to federal and state estimated tax payments on family and medical leave
465 benefits.

466 (3) Under regulations established by the Secretary, applicable taxes will be deducted and withheld from the
467 covered individual's payment of family and medical leave benefits.

468 § 3715. Family and Medical Leave Insurance Account Fund; establishment and investment.

469 (a) A special fund designated as the Family and Medical Leave Insurance Fund is created. The Fund holds all
470 revenues collected under this chapter. All moneys credited to the Fund are continuously available for expenditure in
471 accordance with this chapter.

472 (b) The State Treasurer shall invest the Fund consistent with the investment policies established by the Cash
473 Management Policy Board. The State Treasurer shall credit interest to the Fund on a monthly basis consistent with the rate
474 established by the Cash Management Policy Board. Expenditures from the Fund may be used only for the purposes of the
475 family and medical leave benefits program under this chapter. Only the Secretary or the Secretary's designee may authorize
476 expenditures from the Fund.

477 (c) The Department may use expenditures from the Fund to pay for the costs associated with administering the
478 provisions of this chapter.

479 § 3716. Private plans.

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

483 a. Provide one or more of the following:

484 1. Family caregiving leave to a covered individual for the reasons under § 3702(a)(2) and (a)(4) of
485 this title for the maximum number of weeks in a benefit year required under § 3703(a)(2) of this title.

486 2. Medical leave to a covered individual for the reasons under § 3702(a)(3) of this title for the
487 maximum number of weeks in a benefit year required under § 3703(a)(2) of this title.

488 3. Parental leave to a covered individual for the reasons under § 3702(a)(1) of this title for the
489 maximum number of weeks in a benefit year required under § 3703(a)(1) of this title.

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

- 492 c. If family caregiving leave is provided, allow family caregiving leave to be taken for all purposes
493 specified under § 3702(a)(2) and (a)(4) of this title.
- 494 d. If family caregiving leave is provided, allow family caregiving leave under § 3702(a)(2) and (a)(4) of
495 this title to be taken to care for any family member.
- 496 e. If medical leave is provided, allow medical leave under § 3702(a)(3) of this title to be taken by a
497 covered individual with any serious health condition.
- 498 f. Provide a wage replacement rate during all covered leave of at least the amount required under §
499 3704(a)(1) of this title.
- 500 g. Provide a maximum weekly benefit during all covered leave of at least the amount specified under §
501 3704(a)(3) of this title.
- 502 h. Provide a minimum weekly benefit during all covered leave of at least the amount specified under §
503 3704(a)(2) of this title.
- 504 i. Allow covered leave to be taken intermittently or on a reduced schedule as authorized under § 3706 of
505 this title.
- 506 j. Impose no additional conditions or restrictions on the use of covered leave beyond those explicitly
507 authorized by this chapter or regulations issued under this chapter.
- 508 k. Allow an employee covered under the private plan who is eligible to take covered leave under this
509 chapter to take covered leave under the private plan.
- 510 l. Providing that the cost to employees covered by a private plan is not greater than the cost charged to
511 employees under the State program.
- 512 m. Provide an internal administrative review process and notice to employees of the option to appeal a
513 final determination of the private plan to the Family and Medical Leave Insurance Appeal, consistent with § 3711
514 of this title.
- 515 (2) For a private plan to be approved as meeting an employer's obligations under this chapter, the private plan
516 must also comply with all of the following:
- 517 a. If the private plan is in the form of self-insurance, the employer must furnish a bond running to the
518 State, with a surety company authorized to transact business in this State as surety, in a form as may be approved
519 by the Department and in an amount as may be required by the Department. This paragraph (a)(2)a. does not apply
520 to public employers.
- 521 b. Provide for all eligible employees throughout their period of employment.

522 c. If the private plan provides for insurance, the policy must be issued by an admitted insurer, as defined
523 under § 1904 of Title 18.

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

526 (b) An employer may provide all family and medical leave coverage through an approved private plan or may
527 provide 1 or more of medical leave coverage, family caregiving leave coverage, or parental leave coverage using an
528 approved private plan and provide the remaining coverage not provided through an approved private plan using the State
529 program.

530 (c) The Department may withdraw approval for an employer's use of a private plan granted under subsection (a) of
531 this section when terms or conditions of the plan have been violated. The Department may withdraw approval for an
532 employer's use of a private plan for any of the following:

533 (1) Failure to pay approved benefits.

534 (2) Failure to pay benefits timely and in a manner consistent with the State program.

535 (3) Failure to maintain an adequate security deposit.

536 (4) Misuse of private plan trust funds.

537 (5) Failure to submit reports to the Department as required by regulations adopted by the Department.

538 (6) Failure to comply with this chapter or the regulations adopted under this chapter.

539 (d) An employee covered by a private plan approved under this section retains all applicable rights under §§ 3707
540 and 3708 of this title.

541 (e)(1) Private benefits in existence on [the enactment date of this Act] that the Department deems to be comparable
542 to the Family and Medical Leave Program under § 3713 of this title qualify as a private plan under this chapter for a period
543 of 5 years from the start of contribution payments under § 3705 of this title if the Department's approval of private plans
544 under this subsection would not adversely impact the solvency of the Fund.

545 (2) The Department may determine comparable value through consideration of factors including wage
546 replacement, length of leave, interrelated benefits, eligibility criteria, or frequency of allowed leave.

547 (3) An employer seeking to qualify as a private plan under this subsection must notify the Department before
548 January 1, 2024.

549 (f) The Department's denial of an employer's application under subsection (a) of this section, withdrawal of
550 approval for an employer's use of a private plan under subsection (c) of this section, and decision under subsection (e) of
551 this section are subject to the appeal process under § 3711 of this title.

552 (g) An employer that meets the employer's obligations under this chapter through a private plan may provide
553 benefits greater than those required under paragraph (a)(1) of this section.

554 § 3717. Small business opt-in.

555 (a) A small business may opt-in to provide parental leave benefits to its employees who are covered individuals.
556 The small business may opt-in by providing notice to the Department in a manner determined by the Department. After the
557 small business opts-in, the small business must remain opted-in for a period of at least 3 years and may opt-out of coverage
558 for parental leave benefits with 12 months' notice to its employees and the Department, to take effect not sooner than the
559 end of the 3-year period.

560 (b) A small business may opt-in to provide medical leave benefits to its employees who are covered individuals.
561 The small business may opt-in by providing notice to the Department in a manner determined by the Department. After the
562 small business opts-in, the small business must remain opted-in for a period of at least 3 years and may opt-out of coverage
563 for medical leave benefits with 12 months' notice to its employees and the Department, to take effect not sooner than the
564 end of the 3-year period.

565 (c) A small business may opt-in to provide family caregiving leave benefits to its employees who are covered
566 individuals. The small business may opt-in by providing notice to the Department in a manner determined by the
567 Department. After the small business opts-in, the small business must remain opted-in for a period of at least 3 years and
568 may opt-out of coverage for family caregiving leave benefits with 12 months' notice to its employees and the Department,
569 to take effect not sooner than the end of the 3-year period.

570 § 3718. Powers of the Department.

571 (a) The Department shall administer and enforce this chapter.

572 (b) A complaint, on a form created by the Department, may be filed with the Department for noncompliance with
573 this chapter.

574 (c)(1) The Department may audit employers for compliance with this chapter, as determined by the Department.

575 (2) Nothing in this chapter limits the Department of Insurance's jurisdiction over an insurer issuing an
576 approved private plan.

577 (d) The Department may do all of the following under the Department's audit and investigative authority to
578 determine noncompliance with this chapter:

579 (1) Enter and inspect, after 1 day's notice to the employer, the premises or place of business or employment
580 and, on demand, examine and copy, wholly or partly, any or all books, registers, payrolls, and other records, including
581 those required to be made, kept, and preserved under this chapter.

582 (2) Question any employer, employee, or other person in the premises or place of business or employment.

583 (3) Require from an employer full and correct statements in writing, including sworn statements, on forms
584 prescribed or approved by the Department, with respect to the compliance with this chapter, as the Department may
585 deem necessary or appropriate.

586 (4) Investigate such facts, conditions, or matters as the Department may deem necessary or appropriate to
587 determine whether this chapter has been or is being violated.

588 (5) Hold hearings, administer oaths, and examine witnesses under oath, issue subpoenas, compel the
589 attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony,
590 and take depositions and affidavits in any proceeding before the Department. If a person fails to comply with a
591 subpoena lawfully issued or a witness refuses to testify to a matter that the witness may be lawfully interrogated, the
592 Superior Court, on application by the Department, shall compel obedience as in the case of disobedience of the
593 requirements of a subpoena issued from the Court or a refusal to testify to the Court.

594 (e)(1) Following an investigation in which the Department makes an initial determination that an employer has
595 violated 1 or more provisions of this chapter, or an initial determination that a covered individual received an overpayment
596 or violated § 3712 of this title, the Department shall notify the employer or covered individual of the initial determination
597 and of any amounts owed and shall provide the employer or covered individual with an opportunity to appeal the
598 Department’s determination to the Family and Medical Leave Insurance Appeal Board (“Board”). If the Department finds a
599 violation of this chapter, the Department may issue civil penalties under § 3719 of this title.

600 (2) An initial determination that is not appealed within 15 days of the date of the notice is deemed a final
601 determination, and the employer or covered individual shall pay any payments or penalties included in the initial
602 determination to the Fund.

603 (3) If the initial determination is appealed within 15 days from the date of the notice, the Board shall hear the
604 appeal within a reasonable time.

605 (4) The Board shall conduct a hearing on appeal under the Administrative Procedures Act, Chapter 101 of
606 Title 29, and the regulations adopted by the Board. The decision of the Board is final unless appealed to the Superior
607 Court within 30 days.

608 (f) The Department may institute an action in a court of competent jurisdiction for overpayments, penalties, unpaid
609 contributions, or violations of this chapter. In an action brought by the Department under this subsection where judgment is
610 entered for the Department, a court may award costs and, when so awarded, the same amount of costs must be allowed,
611 taxed, and collected as are allowed, taxed, and collected for like services in the court.

612 (g) The Department has exclusive authority to settle any claim related to noncompliance with this.

613 (h) Nothing in this chapter limits the Department's power or authority under other law of this State which may be
614 otherwise applicable to administer or enforce this chapter.

615 (i) The Department may not be required to pay the filing fee or other costs of the action or fees of any nature or to
616 file bond or other security of any nature in connection with an action under this chapter or with supplementary proceedings
617 as a condition precedent to the availability of any process in aid of the action or proceedings. The Department may join
618 various claimants in 1 cause of action.

619 (j) Nothing in this chapter prevents a person from pursuing an action at law or in equity against an employer
620 arising under other applicable law.

621 (k) In addition to the methods of collection authorized by this chapter, the Department may collect a final
622 determination of liability of an employer or covered individual to the Fund by any manner available under other law of this
623 State, including by any manner that unemployment tax assessments may be collected under Chapter 33 of this title,
624 including §§ 3358, 3360, 3361, 3363, 3368, and 3369 of this title.

625 § 3719. Penalties.

626 (a) An employer who violates or fails to comply with any requirement of this chapter, including failing to file
627 reports as prescribed by the Department, failing to make contributions as required by this chapter, and failing to properly
628 handle and remit wage deductions from employees to the Department, is deemed in violation of this chapter and is subject
629 to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

630 (b) An employer who discharges or in any manner discriminates against an employee because that employee has
631 made a complaint or has given information to the Department under this chapter, or because the employee has caused to be
632 instituted or is about to cause to be instituted any proceedings under this chapter, or has testified or is about to testify in any
633 proceedings is deemed in violation of this chapter and is subject to a civil penalty of not less than \$1,000 nor more than
634 \$5,000 for each violation.

635 (c) A civil penalty claim may be filed in any court of competent jurisdiction.

636 (d) Funds from any civil penalty under this chapter, including an overpayment penalty as authorized by § 3712 of
637 this title, must be deposited in the Fund.

638 § 3720. Regulations.

639 (a) The Department may adopt regulations as the Department deems necessary or appropriate to administer or
640 enforce this chapter. Except as may be otherwise provided by the Department, a regulation adopted under this section takes
641 effect on publication.

642 (b) The Department of Insurance may adopt regulations with respect to private plans under § 3716 of this title.
643 § 3721. Reports.
644 Beginning in 2027, the Department shall report to the General Assembly by April 1 of each year on projected and
645 actual program participation by purpose under § 3702(a) of this title, gender of beneficiary, Fund balances, outreach efforts,
646 and total utilization and amounts paid out of the Fund by category.
647 § 3722. Public education.
648 (a) The Department shall conduct a public education campaign to inform employees and employers regarding the
649 availability of family and medical leave benefits.
650 (b) The Department may use a portion of the funds collected for the family and medical leave benefits program in
651 a given year to pay for the public education program.
652 (c) Outreach information provided under this section must be available in English, Spanish, and other languages
653 spoken by more than 5% of the state’s population.
654 § 3723. Sharing technology.
655 The Department is encouraged to use State data collection and technology to the extent possible and to integrate
656 the family and medical leave benefits program with existing state policies.
657 Section 2. If any provision of this Act or the application of this Act to any person or circumstance is held invalid,
658 the remainder of this Act or the application of the provision to other persons or circumstances is not affected.
659 Section 3. This Act takes effect on July 1, 2022.
660 Section 4. This Act is known as the “Healthy Delaware Families Act”.

SYNOPSIS

This Act, the Healthy Delaware Families Act, creates a statewide paid family and medical leave insurance program. Delaware employees can access up to 12 weeks of paid family and medical leave through the State's paid leave trust fund for a qualifying event, including for the following:

- (1) To address a worker's own serious health condition.
- (2) To care for a family member with a serious health condition.
- (3) To bond and care for a new child.
- (4) To address the impact of a family member's military deployment.

This Substitute to Senate Bill No. 1 differs from Senate Bill No. 1 with regard to the eligibility determination process, covered relationships, length of leave, forms of leave covered, cumulative leave, eligibility criteria, implementation timeline, appeal process, departmental powers, and not requiring participation from certain smaller businesses.

This Substitute differs from Senate Substitute No. 1 to Senate Bill No. 1 by making technical corrections, clarifying intent and providing greater statutory detail with regard to appeals, coordination of benefits, definitions, private plans, and departmental powers, and providing temporary flexibility regarding implementation.

Author: Senator S. McBride